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PREFACE TO THE SEVENTH EDITION.

Since the Sixth Edition of this work appeared in 1901 there has been but little statutory alteration in the law herein dealt with. The only measures of any importance in this branch of the law which have been passed are:—(1) The Married Women's Property Act, 1907, which removes the defect in the Act of 1882 pointed out in *Harkness and Allsopp* and effects two other slight changes in the earlier Act. (2) The Married Women's Property Act, 1908, which makes a married woman liable for the maintenance of her parents, thus removing another defect in the Act of 1882. (3) The Agricultural Holdings Act, 1908, and the Small Holdings and Allotments Act, 1908, which consolidate the earlier enactments and contain special provisions for the application of capital moneys under the Settled Land Acts and the acquisition of settled lands.

But though the legislative output has been small, the Courts have been busy in deciding questions arising upon the construction and application of the various Acts of Parliament which are discussed in this work. Since the last Edition was published more than two hundred of such decisions have appeared in the various Law Reports, the result of which has been to render a new Edition imperative and to add (with the Statutes above mentioned) some forty pages to the bulk of the work.

In preparing this Edition I have as far as possible followed the course which I adopted in the preparation of its immediate predecessor, viz., I have not altered the original work of Messrs. Hood and Challis further than was rendered necessary by the incorporation of the new Acts and decisions. As I have reason to believe that the annotations to the Trustee Act, 1893, which I introduced into the last Edition have been of some use, these have been continued so as to bring all the decisions on this Act down to the present date.

I must again express my indebtedness to my friend Mr. Stirling for the ready and willing help that he has given me throughout the preparation of this work. I must also thank many of my professional brethren for valuable suggestions which they will find incorporated herein.

All the decisions which have been reported down to the beginning of the present month will, it is believed, be found in the text or in the Addenda on p. lxvii.

PERCY F. WHEELER.

8, New Square,
Lincoln's Inn,
April, 1909.

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ADDENDA.

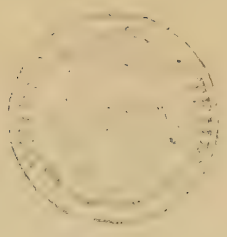
Page 307. An application for payment out of Court to Settled Land Act trustees of a fund exceeding £1,000 which has not arisen under the Act may be made by petition instead of by summons under r. 2 of the Settled Land Act Rules. (*Re Torry Hill Estate, Pemberton* v. *Pemberton*, 1909, 1 Ch. 468.)

Page 454. A husband's liability or a tort committed by his wife ceases on a final decree for judicial separation. (*Cuenod* v. *Leslie*, W. N., 1909, p. 65.)

Page 458. *Goatley* v. *Jones* is now reported 1909, 1 Ch. 557.

Page 468. A policy of insurance effected by a man and his wife in favour of the survivor may be a valid insurance by the wife of her own life under sect. 11 of the Married Women's Property Act, 1882. (*Griffiths* v. *Fleming*, W. N., 1909, p. 65.)

Page 509. Part I. of the Land Transfer Act, 1897, has not altered the rule that where a will contains a trust to pay debts, or an express charge of debts on land, the period of limitation is twelve, and not six, years. (*Re Balls, Trewby* v. *Balls*, W. N., 1909, p. 86.)



THE

VENDOR AND PURCHASER ACT, 1874.

(37 & 38 Vict. c. 78.)

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land.

[7th August, 1874.]

Whereas it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

The Act contains no definition of "land." *Qu.* whether the word includes incorporeal hereditaments: see Dart, V. & P. 7th ed. p. 156; *ibid.* p. 331, note (*h*).

Sect. 2. Rules for regulating

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the

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obligations and rights of vendor and purchaser.

contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

See also Conv. Act, 1881, s. 3, sub-s. (1), and note thereon, p. 16, *post*.

This has not altered the rule, that a lessee has constructive notice of the lessor's title, but he remains in the same position with regard to notice as if, before the Act, he had stipulated not to inquire into the lessor's title. (*Patman* v. *Harland*, 17 Ch. D. 353.)

An agreement to deliver an abstract of the title to the freehold excludes this enactment. (*Re Pursell and Deakin*, W. N. 1893, p. 152.)

A lease comprising a right of way is in that respect within this enactment. (*Jones* v. *Watts*, 43 Ch. D. 574.)

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

As to misleading conditions, see note on Conv. Act, 1881, s. 3, sub-s. (3), p. 19, *post*.

It was held in *Bolton* v. *Lond. Sch. Bd.*, 7 Ch. D. 766, that the obligation to abstract and prove a forty years' title may be eluded by causing the abstract to commence with a deed more than twenty years old, containing a recital that the grantor was seised in fee simple. It is conceived that this proposition is no legitimate deduction from the Act, and that it cannot safely be relied upon. The occurrence in the course of the title of a deed more than twenty years old, containing statements of fact material to the prior title, will be *primâ facie* evidence in favour of the prior title; and, unless disproved, will be sufficient evidence. But it does not follow that the vendor is thereby relieved from the duty of abstracting the prior title. In *Re Wallis and Grout*, 1906, 2 Ch. 206, the decision in *Bolton* v. *Lond. Sch. Bd.*, though distinguished, was expressly disapproved, and would probably not now be followed.

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Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

The mere fact that obtaining the title deeds for the purpose of handing the same over to the purchaser upon completion may cause the vendor trouble and expense is no answer to the purchaser's demand for the deeds. (*Re Duthy and Jesson*, 1898, 1 Ch. 419.)

On the other hand, the fact that the title deeds have been lost or mislaid does not release the purchaser from performance of his contract, but he can be compelled to complete if he can be furnished in proper time with satisfactory secondary evidence as to the contents of the lost documents, and as to their having been duly executed and properly stamped. (*Re Halifax Commercial Banking Co. and Wood*, 79 L. T. 536; 47 W. R. 194.) When production in this country is impossible, *e.g.*, of a Scotch probate, secondary evidence is admissible. (*Halkett* v. *Earl of Dudley*, 1907, 1 Ch. 590.)

See also C. A. 1881, s. 3 (6), and notes thereon, *post*, p. 31.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

"Estate" means only estates and interests in land. If a mortgage deed comprises policies of insurance on the life of the mortgagor, in addition to lands, then, on a sale of the lands alone under the power of sale, the purchaser has a right to the mortgage deed, although the policies are retained by the mortgagee. (*Re Williams and Duchess of Newcastle*, 1897, 2 Ch. 144.) But documents of title showing the title to and extinguishment of an easement formerly appurtenant to the land sold over a servient tenement retained by the vendor relate to the servient tenement, and may be retained by the vendor. (*Re Lehmann and Walker*, 1906, 2 Ch. 640.)

Sect. 3.

3. *Trustees who are either vendors or purchasers may*

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sell or buy without excluding the application of the second section of this Act.

Trustees may sell, &c., notwithstanding rules.

This section was repealed by the Trustee Act, 1893; and s. 15 of that Act is substituted for it. (See p. 399, *post.*)

Sect. 4.

Legal personal representative may convey legal estate of mortgaged property.

4. *The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.*

Repealed by Conv. Act, 1881, s. 30, sub-s. (2), p. 112, *post.*

This section did not apply to a transfer of a mortgage; and therefore the legal personal representative of the mortgagee could not, on receiving payment of the mortgage debt, convey the legal estate to a transferee. (*Re Spradbery*, 14 Ch. D. 514.)

The word "convey" seems to mean "re-convey." It was accordingly held in *Re White*, W. N. 1881, p. 115; 29 W. R. 820, that the executors of a deceased mortgagee, who in his lifetime had contracted to sell, and whose will contained no devise of trust or mortgage estates, could not convey the legal estate of freeholds.

Sect. 5.

Bare legal estate in fee simple to vest in executor or administrator.

5. *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.*

Repealed as to England by the Land Transfer Act, 1875, 38 & 39 Vict. c. 87, s. 48, and re-enacted so far as regards the death of a bare trustee intestate. The last-mentioned enactment was repealed by Conv. Act, 1881, s. 30, sub-s. (2), p. 112, *post.* The section is repealed as to Ireland by Conv. Act, 1881, s. 73, p. 173, *post.*

Upon the meaning of the phrase "bare trustee," see *Christie* v. *Ovington*, 1 Ch. D. 279, which was approved of by Stirling, J., in *Re Cunningham and Frayling*, 1891, 2 Ch. 567; *Morgan* v. *Swansea Urban San. Auth.*, 9 Ch. D. 582; *Re Docwra, D.* v. *Faith*, 29 Ch. D. 693.

Sect. 6.

Married woman who is a bare trustee may convey, &c.

6. *When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.*

This section was repealed by the Trustee Act, 1893, and s. 16 of that Act is substituted for it. (See p. 399, *post.*)

V. & P. Act. 1874. Sect. 7.

Protection and priority by legal estates and tacking not to be allowed.

7. *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.*

This section was repealed as from the date at which it came into operation, as to England by the Land Transfer Act, 1875, s. 129, "except as to anything duly done thereunder before the commencement" (1st January, 1876) of that Act, and as to Ireland by Conv. Act, 1881, s. 73, p. 173, *post*. As to the circumstances under which it has been said that this section may, notwithstanding the repeal, have some operation, see *Robinson* v. *Trevor*, 12 Q. B. D. 423, at p. 433.

Sect. 8.

Non-registration of will in Middlesex, &c. cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

As to the effect before this Act of non-registration within the prescribed time, see *Chadwick* v. *Turner*, L. R. 1 Ch. 310.

Sect. 9.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such

V. & P. Act. 1874. Sect. 9.

order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

The parties to a summons under this section stand, as regards evidence, in the same position as parties in a reference as to title in an action for specific performance; and therefore they are entitled, as of right, to read evidence relating to requisitions upon the title, without obtaining any directions from the judge. (*Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601.) But it has been held that, on a summons to decide whether a purchaser is entitled to the insertion of a particular covenant in his conveyance, the Court cannot decide a preliminary question of fact. (*Re Gray and Metrop. Railw. Co.*, 44 L. T. 567.)

A general declaration as to title ought rarely to be made on a summons under this section, the procedure being only intended for the decision of isolated points arising out of or connected with the contract, *e.g.*, a point on the form of the conveyance. (*Re Wallis and Barnard*, 1899, 2 Ch. 515.)

A lessor and lessee are a vendor and purchaser within the meaning of the section, therefore as between them the Court will decide a question arising out of the contract for the lease, *e.g.*, as to what covenants and conditions should be inserted in the lease. (*Re Anderton and Milner*, 45 Ch. D. 476; *Re Lander and Bagley*, 1892, 3 Ch. 41; *Re Stephenson and Cox*, 36 Sol. J. 287.)

In addition to deciding the express point in dispute, the Court has jurisdiction to give consequential relief. For example, after deciding that a defect is fatal to the title, it has been held that the Court may order the return of the deposit, and payment of the costs of investigating the title (*Re Hargreaves and Thompson*, 32 Ch. D. 454, approving *Re Yeilding and Westbrook*, 31 Ch. D. 344, and *Re Higgins and Hitchman*, 21 Ch. D. 95, at p. 99; *Re Marshall and Salt's Contract*, 1900, 2 Ch. 202; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666) even where the summons is taken out by the vendor (*Re Walker and Oakshott*, 1901, 2 Ch. 383). But if a declaration is made that the title is not such as the purchaser can be compelled to accept, upon grounds which involve the

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question of the validity of the contract, no order for return of the deposit can be made on the summons. (*Re Davis and Cavey*, 40 Ch. D. 601.) This is without prejudice to the right of the purchaser to bring an action for return of the deposit. (*Ibid.*) There is no jurisdiction to entertain a summons taken out solely for the purpose of recovering money, for instance, interest on purchase-money paid in error. (*Re Young and Harston*, 29 Ch. D. 691. Upon appeal, *S. C.* 31 Ch. D. 168, the question of jurisdiction was expressly waived.) Compensation for delay cannot be obtained on summons. (*Re Wilsons and Stevens*, 1894, 3 Ch. 546.)

A question as to the amount of the vendor's costs on a sale is not properly raised upon a summons under this Act, the solicitor not being a party to and bound by the proceedings. Such a question should be raised on taxation. (*Per* Romer, L.J., in *Re Webster and Jones*, 1902, 2 Ch. 551.)

A question whether a notice to rescind is valid, is not a question affecting the validity of the contract so as to take the case out of the jurisdiction under this section. (*Re Jackson and Woodburn*, 37 Ch. D. 44.) And the Court is not deprived of jurisdiction by the fact that one party may be entitled to rescind the contract on the ground of mistake. (*Re Wallis and Barnard*, 1899, 2 Ch. 515.) Nor by the fact that evidence has been adduced tending to throw a doubt upon the existence or the validity of the contract. (*Re Hughes and Ashley*, 1900, 2 Ch. 595.) If the contract, though not void, is such that specific performance could not be had, the Court may express an opinion on questions liable to be raised in an action for damages. (*Re Lander and Bagley*, 1892, 3 Ch. 41; approved in *Re Hughes and Ashley*, 1900, 2 Ch. 595.)

There is no jurisdiction to decide questions as to the destination of the purchase-money, unless they affect the purchaser. (*Re Tippett and Newbould*, 37 Ch. D. 444, at p. 446.)

It has been held that a purchaser who has obtained an order on a summons disposing of his objections and ordering the vendor to make compensation is not entitled, if the vendor refuses to comply with the order, to bring an action for specific performance and damages; but should apply in chambers to have the order enforced. (*Thompson* v. *Ringer*, W. N. 1881, p. 48; 29 W. R. 520.)

After judgment on a summons, it is too late for the vendor to rescind under the common condition. (*Re Arbib and Class*, 1891, 1 Ch. 601.)

If a declaration is made, on a vendor and purchaser summons, that the vendor has shown a good title according to the conditions, and if this is affirmed in the Court of Appeal, and if facts are subsequently discovered which prove the title to be absolutely bad, and if these facts could not with due diligence have been discovered by the purchaser in time to prevent the order or its confirmation: then, if the vendor brings an action for specific performance, the purchaser may counterclaim by way of action of review. (*Scott* v. *Alvarez*, 1895, 1 Ch. 596; *S. C.* 1895, 2 Ch. 603.)

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In *Re Baker and Selmon*, 1907, 1 Ch. 238, an unsuccessful purchaser was not ordered to pay any costs, the Court considering that, having regard to the language of the conditions, he was fairly entitled to submit the question.

An appeal from an order on a summons under this section must now be brought within fourteen days from the time when the order was pronounced. (R. S. C. Ord. 58, r. 15, as altered by the Rules of 1893, r. 27; *Re Ricketts and Avent*, W. N. 1890, p. 16.) As to the principles on which an extension of time may be allowed, see *Re Blyth and Young*, 13 Ch. D. 416; *Re New Callao*, 22 Ch. D. 484; *Re Walker and Oakshott*, W. N. 1902, p. 147.

Sect. 10. Extent of Act.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

THE

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

(44 & 45 Vict. c. 41.)

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. [22nd August, 1881.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—Preliminary.

Sect. 1. Short title; commencement; extent.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

Sect. 2. Interpretation of property, land, &c.

2. In this Act—

The word "includes" would naturally signify "includes in addition to the word's more usual meaning." This view of the word's import seems to be in agreement with the remark made by Lord Esher, M.R., in *Re Potts, Ex pte. Taylor*, 1893,

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1 Q. B. at p. 658. The word appears to have this signification in sub-sects. (iii.), (iv.), (vi.) so far as regards the words "mortgagor" and "mortgagee," (viii.), (xi.), (xii.), (xiv.), (xv.), (xvi.), and (xvii.). But where the several particulars enumerated are all, or nearly all, such as without enumeration would be supposed to be included, there seems to be no sense in the enumeration unless it was intended to be exhaustive. This remark applies to sub-sects. (i.), (ii.), (v.), (vi.) so far as regards the word "mortgage," (vii.), (ix.), (x.) and (xiii.).

The operation of the section is confined to the Act, and no light seems to be thrown upon these definitions by other definitions gathered from other sources. From *Meux* v. *Jacobs*, L. R. 7 H. L. 481, it appears that the definition of "fixtures," occurring in the interpretation clause 17 & 18 Vict. c. 36 (Bills of Sale Act), s. 7, did not apply to fixtures, even though comprised in a mortgage of leaseholds to which they were attached, unless the nature of the mortgage was such as to make it a bill of sale within the meaning of the Act.

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

Compare Conv. Act, 1882, s. 1, sub-s. (4) (i.), p. 180, *post*.

The chief things included under "property," which are not, by virtue of the next sub-section, included under "land," seem to be (1) equitable estates for life and *pur autre vie;* (2) personal chattels; (3) legal and equitable choses in action, including mortgage debts; (4) annuities for life not charged upon land, or for years, whether charged upon land or not; (5) terms of years, as to which see the next note; (6) the benefit of building agreements and similar nondescript equities.

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

This definition did not occur in the original draft Bill introduced into the House of Lords by Lord Cairns in 1880. It does not much assist the consistent and intelligent interpretation of the Act.

The phrase, "land of any tenure," properly means land of freehold, copyhold, and customaryhold tenure. This includes (1) freeholds commonly so called, conformable in all respects to the course of the common law, which is the general custom of

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the realm; (2) freeholds associated with peculiar customs, such as gavelkind, borough-English, and the like, which in these particulars vary from the course of the common law; (3) copyholds held by copy of court-roll at the will of the lord; and (4) customary freeholds, which are a peculiar form of copyholds, requiring admittance in order to acquire the legal estate, and expressed to be held according to the custom of the manor without any reference to the will of the lord. Although the incorrect and misleading expression, "leasehold tenure," in reference to lands held for a leasehold interest, is sometimes used even by conveyancers of high reputation, yet the phrase, "land of any tenure," does not, in its ordinary usage, include terms of years; nor can it here be supposed to do so, except by making it include all estates and interests in lands; and if that had been the intention, no reason can be given why the vague and cumbrous verbiage of the sub-section should have been substituted for the simple words which would clearly have expressed what was meant. In some cases, such as *Wilson* v. *Eden*, 11 Beav. 237, 16 Beav. 153, words denoting real estate have, in a will and by virtue of s. 26 of the Wills Act, been held to include leaseholds; but this has no bearing upon the meaning of the word "land" in Acts of Parliament generally. The last cited case was discussed in *Prescott* v. *Barker*, L. R. 9 Ch. 174.

This ambiguity has been avoided in S. L. Act, 1882; see s. 2, sub-s. (10) (i.), of that Act, and note thereon, p. 219, *post*.

For the full meaning of the words, "tenements and hereditaments, corporeal and incorporeal," see Challis, R. P. Ch. VII. Much of this meaning seems to be everywhere excluded from the present Act by the context. In many places where the word "land" occurs in the Act, its meaning is qualified by some addition. Though the definition contains no word which can properly include any estate or interest less in *quantum* than a freehold, yet in some passages of the Act there seems to be an intention to include under the word "land" a term of years. (See sects. 5, 6, 18, 42, 44, *post*.)

By the Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 3, the expression "land" in every Act passed after the year 1850, includes "messuages, tenements, and hereditaments, houses, and buildings of any tenure," unless "the contrary intention" appears. This replaces the corresponding provision of Lord Brougham's Act, 13 & 14 Vict. c. 21, s. 4, that the word "land" in Acts of Parliament beginning with the session of 1851, should include "messuages, tenements, and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." These enactments seem not to apply to the present Act; and if they did, they would apparently add nothing to it.

Qu. whether the word "land," as used in the V. & P. Act, 1874, includes incorporeal hereditaments. (Dart, V. & P. 7th ed. p. 156; *ibid.* p. 331, note (*h*).)

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(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

See S. L. Act, 1882, s. 2, sub-s. (10) (i.), and note thereon, p. 219, *post*.

(iv.) Manor includes lordship, and reputed manor or lordship:

The court-baron "is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost." (2 Bl. Com. 91; and see *Bradshaw* v. *Lawson*, 4 T. R. 443, and *Rumsey* v. *Walton*, there referred to, at p. 446; Com. Dig. tit. Ancient Demesne, G. 3, citing 4 Inst. 270, *ad init.*; 2 Roll. Abr. 122, F. pl. 2.) It then becomes a reputed manor. But the customary court remains, if there be copyholders. (Co. Litt. 58 a.)

The failure of tenants is caused by the extinction of their tenancy, which for this purpose is practically a tenancy in fee simple held directly of the manor; but the services are due, not necessarily from the tenant in fee simple, but from the tenant for the time being of the immediate freehold. Watkins has expressed the opinion that a tenancy in fee simple is not necessary for the purpose of qualifying a suitor to the court-baron, and that any tenancy of freehold will suffice. (1 Watk. Cop. 15.) It would hardly be safe, in the absence of judicial decision, to rely upon this opinion. It is true that this opinion is quite consonant with the history and nature of feuds; but it is believed that the old conveyancers endeavoured to prevent the extinction of manors by seeking to evade the statute *Quia Emptores*; which they would hardly have done if the simple expedient suggested by Watkins would, in their opinion, have been effectual.

When the lands of the tenant come to the lord's hands, whether by purchase or by escheat, the tenure is extinguished, because *nemo potest esse et dominus et tenens*. The extinction of the tenure involves the extinction of the services incident thereto; and now, by the statute *Quia Emptores*, 18 Ed. 1, tenure in fee simple cannot be created *de novo* except by the Crown; and consequently, no rent-service can be reserved upon a grant or conveyance in fee simple. (*Bradshaw* v. *Lawson*, *ubi supra*.) If the above-cited opinion of Watkins is well founded, a manor which is exposed to danger of extinction by reason of escheat—as in a case where only two tenants of the manor in fee simple exist—might be rendered quite secure by granting a sufficient number of leases for lives.

Franchises and privileges appurtenant to the manor are not destroyed by the extinction of the services, but remain as appurtenant to the demesnes. (Cru. Dig. Tit. *Tenures*, Ch. III. s. 22.)

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(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

Note the exception to this definition in s. 7, sub-s. (5), p. 48, *post*.

The words "made by deed" cannot be intended to qualify "covenant," and must, therefore, qualify the preceding words. A conveyance has, therefore, two characteristics: it is (1) made by deed, (2) made on a dealing with or for property. Therefore, the word does not include a surrender of, or an admittance to, copyholds. It seems to include surrenders of leaseholds made by deed.

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into, and is in possession of the mortgaged property:

See note to s. 15, p. 72, *post*.

Mortgagor will, by virtue of this sub-section, include a puisne mortgagee in relation to a prior mortgagee. (*Teevan* v. *Smith*, 20 Ch. D. 724.)

The lien of a company upon the shares of a member for debts due from him to the company, is a mortgage within the meaning of the Act. (*Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506.)

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has

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a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

This extended meaning of "purchaser" is excluded from s. 3, *post*; see sub-s. (8) thereof, p. 24, *post*.

"Purchaser" includes an equitable mortgagee. (*Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. at p. 197.)

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

Semble, a condition by a lessor that a proposed assignee of the lease shall execute a covenant to pay the rent and perform the covenants of the lease during the residue of the term is not a fine within the meaning of s. 3 of the Conveyancing Act, 1892. (*Waite* v. *Jennings*, 1906, 2 K. B. 11.)

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

Compare s. 2, sub-s. (10) (vii.), of S. L. Act, 1882, p. 222, *post*.

"Will" seems also to include its usual meaning; and, therefore, to include a will made by a married woman in exercise of a

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power. Independently of statute, the testamentary power of a married woman stood as follows:—(1) She could appoint the legal estate in lands by declaration of use under a testamentary power; (2) she could devise and bequeath the equitable interest in both realty and personalty settled to her separate use; (3) she could at common law make a will of personalty, which would be good if her husband survived her and assented thereto. (1 Jarm. Wills, 5th ed. p. 40.) The Wills Act (7 Will. 4 & 1 Vict. c. 26) made no alteration in the testamentary capacity of married women. A married woman who has obtained a protection order under 20 & 21 Vict. c. 85, s. 21, can dispose by will of all property acquired by her since the date of the desertion upon which the order was founded. (*In the goods of Ann Elliott*, L. R. 2 Prob. & Div. 274.) As to the testamentary capacity of married women under the M. W. P. Acts, see p. 449, *post*.

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

A company in liquidation is bankrupt within the meaning of this section as applied to s. 14 (6), *post*, p. 68 (*Horsey Estate* v. *Steiger*, 1899, 2 Q. B. 79), even though such liquidation be only voluntary for the purpose of reconstruction. (*Ewart* v. *Fryer*, 1901, 1 Ch. 499; 1902, A. C. 187.)

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

See *Harrison* v. *Corp. of Barrow-in-Furness*, 39 W. R. 250.

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court [of Justice] is referred to as the Court.

The words in brackets are repealed by the Statute Law Revision Act, 1898.

II.—Sales and other Transactions.

Contracts for Sale.

Sect. 3. Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Sub-sects. (3), (6), and (7) use the word *property;* see s. 2, sub-s. (i.), *ante.*

Sub-s. (1) must be read in connection with s. 2, sub-s. (1) of the V. & P. Act, 1874.

37 & 38 Vict. c. 78, s. 2, sub-s. (1).

"Under a contract to grant or assign a term of years, whether "derived or to be derived out of a freehold or leasehold "estate, the intended lessee or assign shall not be entitled "to call for the title to the freehold."

It must also be read in connection with s. 13 of the present Act, p. 63, *post.*

The above-cited section of the V. & P. Act, 1874, contemplates four separate cases: (1) the assignment of an existing lease having a freehold reversion; (2) grant *de novo* of a lease which when granted will have a freehold reversion; (3) the assignment of an existing lease having a leasehold reversion; that is, the assignment of an existing sub-lease; and (4) the grant *de novo* of a lease which when granted will have a leasehold reversion; that is, the grant *de novo* of a sub-lease: in none of which cases can the title to the *freehold* be called for.

Sub-s. (1) of the present section appears to contemplate the third of the above specified cases, and to forbid the title to the reversion upon the sub-lease intended to be assigned, that is to say, the title to the lease out of which the sub-lease is derived, to be called for. In *Gosling* v. *Woolf*, 1893, 1 Q. B. 39, it was held, by a Divisional Court in the Queen's Bench Division, that, under a contract to assign an existing sub-lease, the title to the lease out of which it was derived could be called for; and that the present sub-section merely forbids the title to the freehold, out of which the original lease was derived, to be called for. It is conceived that this decision cannot be supported. In the first place, it is equivalent to saying that the present sub-section merely enacts something which has already been enacted by the V. & P. Act, 1874. Moreover, the language there used is entirely opposed to the common use and analogy of language. The learned judges appear to have thought that the phrase "leasehold reversion" means the estate which is the reversion upon the leasehold. But it is submitted that, as the phrase "freehold reversion" means the estate of freehold which is the reversion upon some other estate, so the phrase "leasehold reversion" means the estate of leasehold which is the reversion upon some other estate; that is to say, the lease which is the reversion upon the sub-lease intended to be assigned.

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Sect. 13, p. 63, *post*, extends the same principle to those examples of the fourth case, in which a *second* leasehold reversion is interposed between the immediate leasehold reversion upon the intended grant and the freehold; that is, it applies to contracts for the grant *de novo* of a sub-sub-lease to be derived out of a lease having a leasehold reversion. On such a grant of a sub-sub-lease, the title to the second leasehold reversion so interposed cannot be called for.

Absence of "the right to call for the title" does not debar the intending purchaser from taking advantage of grounds of objection ascertained *aliunde*.

A purchaser, buying under a contract not excluding statutory conditions of sale, will be fixed with notice of matters appearing on the title for which he cannot call, exactly as if, under the previous law, he had expressly contracted not to call for the vendor's title. (*Patman* v. *Harland*, 17 Ch. D. 353. See also *Nicoll* v. *Fenning*, 19 Ch. D. 258, at p. 267.) As to the extent of this liability, see *Re Cox and Neve*, 1891, 2 Ch. at p. 117; and cf. *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391; *S. C.* 1906, 1 Ch. 386.

A lessee who accepts a lease in consideration of a fine, stands so much in the position of a purchaser that he ought in prudence to make the same investigation of the lessor's title as would be made by a purchaser. The practice of neglecting to investigate the lessor's title on the grant of a lease, depends for its prudence upon the hypothesis that the annual rent is at or near a rack-rent.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

The purchaser is not debarred from taking objection, if ascertained *aliunde*, to the title of the lord to make the enfranchisement.

It is conceived that in framing conditions of sale of enfranchised copyholds a vendor cannot safely omit to stipulate that the purchaser shall take under and subject to any restrictions and conditions which may be contained in the deed of enfranchisement. It will also be advisable, on a sale of enfranchised copyholds where the enfranchisement was voluntary, to continue, notwithstanding this sub-section, to insert a condition precluding the purchaser from making any objection to the lord's title based on any grounds, however ascertained, and to compel him to assume that the lord had authority to make the enfranchisement. On a compulsory enfranchisement the right to the minerals remains in the lord: see the Copyhold Act, 1894, 57 & 58 Vict. c. 46, s 23; and therefore the mode in which the enfranchisement was made must be shown.

A vendor selling freeholds which are in fact enfranchised

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copyholds, but are not in the contract stated so to be, will of course be taken to have contracted to sell the minerals along with the surface; and if he fails to make a good title thereto, the purchaser may rescind. (*Upperton* v. *Nickolson*, L. R. 6 Ch. 436.) But if a contract for the sale of copyholds contains a stipulation that the vendor shall procure their enfranchisement, the purchaser will be taken to have known that on an enfranchisement the lord could reserve the minerals, and cannot rescind upon the ground of such reservation. (*Kerr* v. *Pawson*, 25 Beav. 394.)

Bacon, V.-C., appears, in *Re Agg-Gardner*, 25 Ch. D. 600, to have inferred, from this sub-section, that, upon a voluntary enfranchisement, the lord cannot be compelled to give either an acknowledgment or an undertaking in respect to the title-deeds retained by him; apparently upon the ground that a subsequent purchaser, under an open contract, cannot call for the lord's title. But it is not clear why, on a subsequent sale, the enfranchised copyholder should be prevented from proving his title, if, on settling the terms of a private contract, an intending purchaser from him should insist upon his so doing.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

If a purchaser contracts to accept less than a forty years' title, or other title to which on an open contract he would have been entitled, he is fixed with constructive notice of what he

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would have learned if he had investigated the full title. (*Per* North, J., *Re Cox and Neve*, 1891, 2 Ch. at p. 117; *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391; *S. C.* 1906, 1 Ch. 386.) The words "and he shall assume, unless the contrary appears," throw the burden of proof upon the purchaser, without precluding him from showing, either *aliunde* or on the face of the abstract, that the recitals, &c., are in fact incorrect, &c. The previous words, "Nor shall he . . . make any . . . objection," &c., by virtue of sub-s. (11), *infra*, have, in relation to specific performance, no greater efficacy than a similar condition inserted in a contract would have had before the Act, and therefore they cannot be used by a vendor to cloak material defects which are within the knowledge of the vendor. (*Edwards* v. *Wickwar*, L. R. 1 Eq. 68; *Else* v. *Else*, L. R. 13 Eq. 196; *Harnett* v. *Baker*, L. R. 20 Eq. 50; *Broad* v. *Munton*, 12 Ch. D. 131; *Smith* v. *Robinson*, 13 Ch. D. 148.) But if the vendor believes the data postulated by the condition to be true, he may take advantage of the condition, although he has not in the condition specified the precise defect in the title, which the postulated facts were intended to cure, and although this defect is such as, if the postulated facts should be erroneously stated, would be absolutely fatal to the title. (*Re Sandbach and Edmondson*, 1891, 1 Ch. 99; *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175.) A purchaser will not be precluded from rescinding his contract, if before completion he discovers the existence of restrictive covenants contained in a deed prior to the specified root of title (*Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778; *Re Cox and Neve*, 1891, 2 Ch. 109), or, where the title was based on adverse possession, entered into before the commencement of the possessory title. (*Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391; *S. C.*, 1906, 1 Ch. 386.) Nor will a condition of this nature prevent the rectification of a mutual mistake discovered before completion. (*Jones* v. *Clifford*, 3 Ch. D. 779.) Under such a condition, if a serious defect in the title should be discovered to exist, the purchaser will so far be bound by the condition that, if he refuses to complete, he will not be allowed to recover back his deposit. (*Best* v. *Hamand*, 12 Ch. D. 1; *Rosenberg* v. *Cook*, 8 Q. B. D. 162; *Re Nat. Prov. Bk. of E. and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 2 Ch. 603.) But the vendor will not obtain specific performance. (*Re Scott and Alvarez, supra.*) It is possible to frame a condition which, even on the discovery of very grave defect, shall nevertheless entitle the vendor to specific performance; such as that in the case of *Hume* v. *Bentley*, 5 De G. & Sm. 520; where the words, "The lessor's title will not be shown and shall not be inquired into," were held to preclude objection, and specific performance was decreed. But some doubt may be felt whether this case would now be followed; and it is noteworthy that, in the apparently similar case of *Freme* v. *Wright*, 4 Madd. 364, an abstract of the title, which disclosed the defect, was produced to the purchaser before the contract was executed, while in *Re Turpin*

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and Ahern's Contract, 1905, 1 I. R. 85, the Irish Courts refused to compel a purchaser to complete, although a condition precluded him from making any inquiry into or investigation of the vendor's title, a search having revealed the existence of a settlement which the vendor had forgotten. And a condition that "the vendor's title is accepted by the purchasers" does not relieve the vendor from the duty of disclosing onerous covenants or preclude an objection thereto. (*Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666.) A stipulation, that specified instruments shall be admitted to have had a specified effect, must be accompanied by such a statement of the relevant facts as will render intelligible the import of the required admission. (*Re Lyons and Carroll*, 1896, 1 I. R. 383.) A fair statement, showing the nature of the defect, will be a sufficient ground for specific enforcement, though the title may be defective. (*Re Williams and Parry*, 72 L. T. 869.)

It was held in *Darlington* v. *Hamilton*, Kay, 550, that an under-lessee who had contracted to sell his interest as a *lease*, was disentitled to specific performance, on the ground that other houses were comprised in the superior lease, and that the purchaser might lose his interest by a forfeiture of the superior lease incurred by no fault of his own. In that case it was stated, in argument, that the superior lease contained a provision for the apportionment of the rent and the power of re-entry (see p. 556), but this is referred to only obscurely, if at all, in the judgment.

If there is a stipulated commencement for the title, such commencement must either start with a proper root of title, or else its defects must be clearly shown on the face of the contract. (*Re Marsh and E. Granville*, 24 Ch. D. 11.)

The decision of Kekewich, J., in *Re Neale and Drew*, which purports to be briefly reported, 41 Sol. Journ. 274, is probably reported incorrectly. According to the report it would appear to have been held that the mere fact that the title to different parts of the property commenced with different deeds, absolved the vendor from making a good title to a part of the minerals comprised in the contract for sale.

A sub-recital does not appear, for the purpose of proving the truth of a statement of fact contained therein, to be a recital either for the purpose of this sub-section, or for the purpose of the V. & P. Act, 1874, s. 2. The sub-section only enacts that the recital shall be taken to be correct; and in a sub-recital nothing is recited, except the fact that a statement is contained in a former deed.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of

actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

This and the following sub-section are considered together in the next note.

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

The purchaser is not debarred from showing that the lease, or any superior lease, was in fact not duly granted, or from showing that the covenants and provisions contained in the lease, or in any superior lease, have in fact not been duly performed, the production of the receipt for rent not being conclusive evidence of the due performance of the covenants. (*Re Highett and Bird*, 1902, 2 Ch. 214; 1903, 1 Ch. 287.) Sub-s. (11), *infra*, seems to provide that this shall be a good defence to an action for specific performance. And it is conceived that any receipt tendered in evidence under this enactment must be free from grounds of suspicion on the face of it.

A receipt for a nominal payment, such as a peppercorn, is not a receipt within the meaning of this or the foregoing sub-section. (*Re Moody and Yates*, 30 Ch. D. 344.) It also appears, by the last-cited case, that the rent in question must be a payment in money, not in kind.

A receipt by a ground landlord for rent due under a lease, which has been paid under threat of distress, by an under-lessee, is not a receipt for rent due under the under-lease. (*Re Higgins and Percival*, W. N. 1888, p. 172.)

A vendor who commits a breach of covenant after the execution of the contract, cannot avail himself of the provisions of sub-s. (4). (*Howell* v. *Kightley*, 21 Beav. 331.) Continuing

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breaches would, however, seem to be within the sub-section. (See *Bull* v. *Hutchens*, 32 Beav. 615. See also *Lawrie* v. *Lees*, 7 App. Cas. 19.)

In *Re Highett and Bird*, 1902, 2 Ch. 214; 1903, 1 Ch. 287, the Court held that a purchaser was entitled to produce evidence to show that the premises were out of repair, and that the production of the last receipt for rent was not conclusive evidence to the contrary, although he knew of the defect when he entered into the contract, the Court being of opinion that the rule laid down in *Barnett* v. *Wheeler*, 7 M. & W. 364, as to the purchaser's knowledge of the defect being immaterial, was not affected by this sub-section. But it must be observed that this case was decided on the footing that, as in *Barnett* v. *Wheeler*, the vendor had expressly agreed to make a good title. (*Per* Romer, L.J., in *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226.) In the absence of such a stipulation, the purchaser could not have refused to complete. (*Clarke* v. *Coleman*, W. N. 1895, p. 114; and see *Cato* v. *Thompson*, 9 Q. B. D. 616.)

On any sale under a power contained, or implied by virtue of s. 19, sub-s. (1) (i.), p. 86, *post*, in a mortgage by demise of leaseholds, the vendor must in the contract or conditions of sale expressly provide for the admission by the purchaser that "all rent due under every superior lease, and all the covenants, &c. of every superior lease, have been paid and duly performed, &c. up to that date." Since no rent is reserved on the under-lease by which he holds, he cannot produce any receipt for it, and therefore his case is not within sub-s. (5). And even if he can produce the last receipt for rent due under every superior lease, his case is not within sub-s. (4), from which sales of land held by under-lease are excluded. It seems to make no difference in this respect if the mortgage contains a trust of the "last days" of the superior term in favour of the purchaser.

In a case where the lessor had refused to accept the last instalment of rent, and had commenced an action of ejectment against the lessee, which action had been stayed for non-delivery of particulars, and the vendor had filed an affidavit that to the best of his knowledge and belief, all the covenants had been performed, and the purchaser, having had an opportunity to inspect the premises, brought no evidence of any breach: it was held that there was sufficient *primâ facie* evidence that no breach had been committed. (*Ringer to Thompson*, 51 L. J. Ch. 42.)

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the

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expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

A vendor is bound to supply a complete and proper abstract at his own expense; and therefore, although the contract may be subject to the provisions of this sub-section, he must bear the expense of abstracting documents not in his possession, which are a necessary part of the title. (*Re Johnson and Tustin*, 30 Ch. D. 42.) He must also complete the title by procuring the execution of any document which is necessary for that purpose; such, for example, as a surveyor's certificate that a house has been completed to his satisfaction. (*Re Moody and Yates*, 30 Ch. D. 334.) But if he has supplied an abstract, and the purchaser, for the purpose of verification, requires production of any deed not in the vendor's possession, even of the deed which forms the root of the title, he must pay the costs incident thereto. (*Re Stuart, &c.*, 1896, 2 Ch. 328.) In Ireland it is the custom on an open contract for the vendor to supply copies of all documents in his possession along with the abstract; and this will be enforced. (*Re Furlong and Sheehan*, 23 L. R. Ir. 407.)

It was held by North, J., in *Re Ebsworth and Tidy*, 42 Ch. D. 23, that a will, through which the title was traced, being sufficiently recited in a later deed, did not need to be, though strictly it ought to have been, abstracted in chief; and that, the will not being in the vendor's possession, the expense of its production must be borne by the purchaser. But in *Re Stamford, &c. Bank and Knight*, 1900, 1 Ch. 287, the same learned judge pointed out that in the earlier case the purchaser knew the contents of the will, and consequently it would have been putting the vendor to unnecessary expense to require a full abstract; and he held that where an abstract of title to leaseholds showed an assignment only by way of recital in another document, the vendor must deliver an abstract of the recited document at his own expense.

In a case where the mortgagor had entered into a contract

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for sale without disclosing the existence of the mortgage, it was held by Kay, J., that under this sub-section he could throw upon the purchaser the expense of the production of the deeds in the hands of the mortgagee. (*Re Willett and Argenti*, W. N. 1889, p. 66; 60 L. T. 735.)

The sub-section only deals with the expenses of "production and inspection," and does not affect the ordinary right of a purchaser to have the title deeds handed over to him on completion, and on an open contract the vendor must bear the expense of obtaining such deeds on completion, although they are not in his possession and are not referred to in the abstract. (*Re Duthy and Jesson*, 1898, 1 Ch. 419.)

See also V. & P. Act, s. 2, r. 3, and notes thereon, *ante*, p. 3.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

This sub-section excludes leases and mortgages from the operation of the section. (See s. 2, sub-s. (viii.), p. 14, *ante*.)

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

This sub-section reserves to a purchaser, under the foregoing implied conditions, the common equitable defences. See note on sub-s. (3), *supra*.

As regards trustees, by s. 66, p. 166, *post*, they may sell under the foregoing conditions without incurring liability. But to sell under needlessly depreciatory conditions is ordinarily a breach of trust; and in *Dance* v. *Goldingham*, L. R. 8 Ch. 902, an injunction was granted, at the suit of a *cestui que trust*, against the purchasers as well as the trustees, to restrain the

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completion of a sale, on the ground that the conditions of sale were needlessly depreciatory. Before the passing of the Trustee Act, 1888, s. 3, the objection that the conditions were needlessly depreciatory, would have been a good defence for a purchaser, as against trustees, in a suit for specific performance, even though there might be nothing to show that the conditions had in fact had any injurious effect. The last mentioned enactment is now replaced by the Trustee Act, 1893, s. 14. (See p. 398, *post*.)

In *Dunn* v. *Flood*, 28 Ch. D. 586, the Court, upon the objection of the purchaser, refused specific performance of a contract for sale made by trustees which needlessly contained conditions of a depreciatory character. This went a step beyond *Dance* v. *Goldingham*, in which case the objection proceeded from the *cestui que trust*. This decision seems to imply that, even after conveyance, the contract might (under the former law) have been re-opened as against the purchaser at the instance of the *cestui que trust*.

Sect. 4. Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

The operation of this section will probably be confined in practice to those cases in which a vendor, having contracted to sell the fee simple, dies before completion, either intestate with an infant heir-at-law, or having devised the legal estate to an infant or in settlement. Before the Trustee Act, 1850 (see ss. 7, 30), the purchase-money must have been paid into Court in an action for specific performance, and retained there until the infant attained the age of twenty-one. (*Bullock* v. *Bullock*, 1 Jac. & W. 603.) In such cases, the purchaser, if satisfied (see sub-s. (2)) as to the validity of his contract, may now take a conveyance of the legal estate from the personal representatives of the vendor without being obliged to bring an action

Equitable estates seem not to be within the design of this

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section. Nor if they were would it give any greater safety in dispensing with the heir's concurrence in the conveyance of an equitable fee than could be obtained without it. (See sub-s. (2).) His concurrence might always have been dispensed with by a purchaser who could get in the legal estate, when it was certain that the heir's equity had been effectually barred by the contract. But the purchaser is entitled to the heir's concurrence, to prevent questions as to the validity of the contract from arising. (See *Roberts* v. *Marchant*, 1 Ha. 547; aff. 1 Ph. 370.) In *Duly* v. *Nalder*, 35 L. J. Ch. 52, it was held that the heir-at-law of the vendor of an equity of redemption, who had died before completion, was, for this reason, a necessary party to the conveyance. (See also *Hoddell* v. *Pugh*, 33 Beav. 489.)

The freehold interests other than a fee simple which come within the operation of this section, seem to be base fees and determinable fees.

Estates *pur autre vie* limited to the heir as special occupant are not properly said to be "descendible" to him. (*Per* Lord Kenyon, *Doe* v. *Luxton*, 6 T. R. 289, at p. 291.) It would be more prudent not to rely upon their coming within the operation of this section.

It is conceived that, on the death of a vendor who has contracted to sell for a fee simple, the fee is not "vested on any trust . . . in" the vendor "solely," within the meaning of s. 30, p. 109, *post*, which seems to contemplate only express trusts. It is true that in *Lysaght* v. *Edwards*, 2 Ch. D. 499, Jessel, M.R., held, that estates contracted to be sold are trust estates for the purpose of passing under a devise of trust estates. But he expressly held that this result was due to the intention of the testator; and the case seems to have no application where no question of intention is relevant. (See also the remarks of Lord Cairns in *Shaw* v. *Foster*, L. R. 5 H. L. 321, at p. 338.)

The present section seems to be permissive only, enabling the personal representatives to convey the estate without disabling the heir or devisee.

Discharge of Incumbrances on Sale.

Sect. 5. Provision by Court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise

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provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

The section is intended to enable charges to be got rid of in cases where the person entitled cannot be found, or where, owing to the infancy of children entitled to portions, the money has not become actually raiseable; or, in the case of jointure rent-charges, where the charge is not redeemable as a mortgage.

As by s. 2, sub-s. (viii.), p. 14, *ante*, "sale means only a sale properly so called," the machinery of this section is not applicable to intended mortgages.

This section applies to ordinary sales *inter partes*, as well as to sales by the Court. Lands may be sold under it free from incumbrances—(1) upon the application of the purchaser in all cases, and (2) on the application of the vendor, when the purchaser consents, and is willing to pay into Court a sufficient part of the purchase-money to meet the requirements of the section. But if the purchaser should not consent, it is conceived that the sale could not be made free from incumbrances, unless it is either made by the Court, or the vendor is able to provide the required sum of money without the purchaser's assistance; for in the case of an ordinary sale out of Court there seems to be no jurisdiction to order the purchaser to pay any part of the purchase-money into Court before the execution of the conveyance, and no conveyance can be made free from incumbrances until after payment into Court of the required sum. This section cannot have been intended indirectly to confer jurisdiction to make orders for specific performance in chambers; which would practically be the result of ordering the purchaser to pay part of the purchase-money into Court against his will. The word "direct" seems to apply to sales by the Court, and the word "allow" to sales out of Court.

It may sometimes be convenient for the vendor to stipulate in the contract that, on accepting the title, the purchaser shall pay the required sum into Court out of the purchase-money.

The Court will decide a question of construction, involving the determination of the rights of unborn children, if it is necessary in order to ascertain the amount to be paid into Court under this section. (*Re Freme*, 1895, 2 Ch. 778.)

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In *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788, Pearson, J., inclined to the opinion that this section does not apply to a perpetual rent-charge secured upon land by statute; and he decided that, at all events, the Court would not compel a vendor to pay money into Court for the purpose of discharging such an incumbrance, whenever this course would inflict great hardship upon him. There are grounds for suspecting that in this case the rent-charge was charged not only upon the land contracted to be sold, but also upon other lands of the vendors.

Sect. 45, p. 135, *post*, provides a general method for the redemption of annual sums charged upon land in perpetuity.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

On the meaning of "incumbrance," see s. 2, sub-s. (vii.), p. 13, *ante*; it might include rent-charges, but not quit rents or chief rents, as to which see s. 45, p. 135, *post*.

Applications under this section must be made by summons at chambers. See s. 69, sub-s. (3), p. 169, *post*; *Patching* v. *Bull*, 30 W. R. 244; affirmed on appeal, W. N. 1882, p. 113. On the meaning of "the Court," see, as to lands in England, s. 2, sub-s. (xviii.), p. 15, *ante*, and s. 69, sub-s. (1), p. 168, *post*; as to lands in the County Palatine of Lancaster, s. 69, sub-s. (9), p. 169, *post*; and as to land in Ireland, s. 72, sub-ss. (2) and (3), p. 172, *post*. As to the giving of notice, see s. 69, sub-ss. (4), (5), and (6), p. 169, *post*; as to costs, s. 69, sub-s. (7), *ibid*.

Before the Act, land subject to any incumbrance could not be sold, even by the Court, free therefrom without the consent of the incumbrancer. (*Langton* v. *Langton*, 1 Jur. N. S. 1078; *Wickenden* v. *Rayson*, 6 De G. M. & G. 210.)

It is generally understood that the discretion given by this section to "redeem a mortgagee behind his back," will not be exercised, unless it is proved to be impossible to communicate with the mortgagee. Evidence, however, as to the amount of the debt, might be furnished by the form of the receipts given by the mortgagee. Redemption without notice seems to involve the confiscation of any rights of consolidation to which the mortgagee may be entitled; and also of an option to purchase; as to which see *Milford Haven Rway. Co.* v. *Mowatt*, 28 Ch. D. 402; where, however, Pearson, J., seems to have thought that there was not a *bonâ fide* intention of exercising the option. Where purchase-money greatly exceeds the incum-

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brances, the land may be freed on its payment into Court. (*Archdale* v. *Anderson*, 21 L. R. Ir. 527.)

When the order is made in an action to which the incumbrancer is not a party, it should follow the words of the Act; and after directing payment into Court of the purchase-money, and the setting aside of an amount sufficient to meet the incumbrance, proceed to declare that thereupon any party shall be at liberty to apply in chambers for a declaration that the land is freed from the incumbrance. (*Dickin* v. *Dickin*, W. N. 1882, p. 113; 30 W. R. 887.)

The word "land," by virtue of s. 2, sub-s. (ii.), p. 10, *ante*, includes every estate equal in *quantum* to a freehold, whether legal or equitable, in land, except equitable estates for life and *pur autre vie*. But to restrict the word to this meaning seems foreign to the general purpose, and it is not improbable that the word "land" in the present section will be held to include *every estate or interest whatsoever in land*.

Only one meaning is appropriate to the phrase "*the* land." This seems to mean, "the estate or interest which is the subject of the sale."

Then it appears that three cases are contemplated, of which two are specially provided for:—

(1.) An *annual* sum, charged on *the land*; which probably means, charged in any manner whatever upon the estate or interest sold, whether upon the whole estate or upon a partial or particular estate derived thereout. For it is impossible to suppose that annual sums charged upon the whole estate are to be specially protected, and that those charged upon a partial derived estate, which seem still more to need protection, are to be neglected;

(2.) A *capital* sum charged on *a determinable interest in* the land; that is, upon a particular estate or interest derived out of the estate or interest which is the subject of the sale;

in either of which cases the capital sum paid into Court (independently of the additional amount not exceeding ten per cent.) must suffice *by its dividends* to keep down, or *otherwise provide for*, the charge.

The remaining case is where—

(3.) A capital sum is charged upon any estate or interest other than a determinable interest of the above specified kind; including a term of years subsisting as a separate estate by itself, not as one out of several successive estates or interests created by a settlement and sold all together.

Upon the foregoing interpretation there seems to be no reason, if a leasehold interest is sold, which is subject to the charge of a capital sum, why the leasehold should not be freed from the charge under this section. And in such a case it is submitted that it would be sufficient to pay into Court the amount of the charge together with the additional margin not

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exceeding ten per cent.; and that it would not be necessary that the sum paid in should suffice by *its dividends* to keep down the charge; because, though a leasehold is undoubtedly a determinable interest, yet, if it is the whole subject of the sale, it is not a determinable interest in *the land*, within the meaning of this section.

For a form of order made in a case where land was subject to an annuity, see *Patching* v. *Bull*, 30 W. R. 244.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

It is conceived that under the wide language of this sub-section, the Court will assume jurisdiction to deal with the fund in any way which it thinks proper; among other things, to award to the mortgagee six months' interest in lieu of notice to redeem, or compensation for anticipating the payment of a loan arranged for a time certain, or for any loss which may accrue by the transmutation of his security; and perhaps to indemnify him for the loss (if such should occur) of any right of consolidation to which he may be entitled. The notice appears to be notice given by direction of the Court, and would not include notice given before commencement of the proceedings. Such notices do not come within the operation of s. 67, p. 167, *post*.

The question, who are the persons "entitled" to receive or give a discharge for the money, may sometimes involve no little difficulty. Suppose a tenant for life and a tenant in fee simple in remainder to concur in selling an unincumbered fee simple, when the life estate is subject to a mortgage, and that the machinery of this section is employed. In this case the sum paid in must suffice *by its dividends* to keep down the charge. But the mortgagee will have no right or title to give a discharge for the corpus. The Court might, no doubt, award him so much of the corpus as would suffice to pay off the charge, together with six months' interest in lieu of notice; and *after such award* he could give a discharge for that amount; but his right would be derived solely from the award of the Court, while the words, "persons entitled," seem to mean, persons who have an independent and a pre-existing title. In the case supposed, the intrinsic and independent right of the mortgagee is, in default of redemption, to foreclose the life estate, that is, to receive the whole rents and profits during the life of the tenant for life; and this has no logical relation to the sum paid into Court, although it may probably happen that such sum will be large enough to enable the Court to protect his interests.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

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General Words.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

Sect. 6. General words in conveyances of land, buildings, or manor.

This section was not intended to alter contracts, but only to say what, in the absence of a contrary intention, the conveyance should mean. If the contract is for the sale of land "with the appurtenances," this will not give the purchaser more than he would have got, under a like contract, before the Act. Therefore if, by reason of the particular circumstances, this section would give him more, the vendor is entitled to have the effect of the section modified in the conveyance. (*Re Peck and Sch. Bd. for Lond.*, 1893, 2 Ch. 315; *Re Hughes and Ashley*, 1900, 2 Ch. 595.)

For a case where a right of way was held not to be obvious or apparent, and therefore not to pass under the general words imported into the conveyance by this section, see *Titchmarsh* v. *Royston Water Co.*, 81 L. T. 673; 48 W. R. 201; and for a contrary case see *Brazier* v. *Glasspool*, W. N. 1901, p. 237; 1902, p. 162.

The general words imported by this section will only pass such rights as are known to the law (*Burrows* v. *Lang*, 1901, 2 Ch. 502), and such as the grantor could grant by express words. (*Godwin* v. *Schweppes*, 1902, 1 Ch. 926; *Quicke* v. *Chapman*, 1903, 1 Ch. 659.) Consequently they do not include that which the grantor had no power to grant. (*S. C.* and *International Tea Stores Co.* v. *Hobbs*, 1903, 2 Ch. 165, 172.) As to effect of the section on the right to an artificial water-course, see *Burrows* v. *Lang*, *ubi sup.* The question of enjoyment is one of fact, not of title, and under the general words all ways actually used by the vendor at the date of the conveyance will pass, though used only by permission of the vendor. (*International Tea Stores Co.* v. *Hobbs*, 1903, 2 Ch. 165.)

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(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

In the plan to the conveyance of a house, adjacent land belonging to the grantor, over which windows looked, was described as "building land." It was held that this description

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was not a sufficient indication of an intention to prevent an unrestricted right to light from passing to the grantee. (*Broomfield* v. *Williams*, 1897, 1 Ch. 602.) In such a case the grantor cannot so build on the adjacent land as to cause "any material obstruction" to the light coming to the windows. The extent of the right passing by the grant has, however, to be ascertained by the circumstances at the time of the grant. (*Quicke* v. *Chapman*, 1903, 1 Ch. 659.) Accordingly, if the land is conveyed under a building scheme which presupposes that adjoining land will be built on, the grantee does not acquire an unrestricted right to light. (*Godwin* v. *Schweppes, Ltd.*, 1902, 1 Ch. 926.) Where a lease of a house contains no express grant of lights, such a grant will be imported by virtue of the general words in the section. (*Pollard* v. *Gare*, 1901, 1 Ch. 834.)

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

The phrase "conveyance of land" will probably be held to include an *assignment of a term of years*, either by virtue of the fact that *assignment* is included in *conveyance*, s. 2, sub-s. (v.), p. 13, *ante*, or else by enlarging the meaning of *land* beyond that given in s. 2, sub-s. (ii.), *ante*, by virtue of the word's colloquial usage.

General words, as used in conveyances of lands and manors, denote things divisible into three classes:—

(1.) Things which, in construction of law, are parcel of the thing conveyed, or a necessary constituent element thereof, such as the court-baron of a manor, buildings, growing trees, ungotten minerals;

(2.) Easements and other rights, privileges, and franchises which are either appurtenant or appendant to the thing conveyed, such as rights of way, other easements, commons;

(3.) Easements which had formerly been appurtenant to the thing (the *quondam* dominant tenement) conveyed; but had at the time of conveyance become extinguished by the unity of seisin of the dominant and servient tenements in the same hands for an estate of fee simple.

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If the unity of seisin is for any less estate, or is not in possession, the easement is not extinguished, but only suspended, and will revive without being regranted upon a severance. (*James* v. *Plant*, 4 A. & E. 749, see p. 762; *Thomas* v. *Thomas*, 2 C. M. & R. 34; *Simper* v. *Foley*, 2 J. & H. 555.)

After such extinguishment, easements cannot pass upon a severance as being, properly speaking, appurtenant to the *quondam* dominant tenement. But easements which are *continuous* and *apparent*, will, upon a grant of the *quondam* dominant tenement, be re-created by way of implied grant, without the use of any words to express such an intention; and even though they first sprang up as usages during the unity of the seisin. (*Ewart* v. *Cochrane*, 4 Macq. 117, see p. 122; *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Pearson* v. *Spencer*, 1 B. & S. 571, at p. 588; *Polden* v. *Bastard*, L. R. 1 Q. B. 156, at p. 161; *Allen* v. *Taylor*, 16 Ch. D. 355; *Bayley* v. *G. W. Rway. Co.*, 26 Ch. D. 434; *Russell* v. *Watts*, 10 App. Cas. 590.)

The doctrine of *Pyer* v. *Carter*, 1 H. & N. 916, which appears often to be confused with the doctrine referred to in the preceding paragraph, is in reality widely different. It refers, not to the question, what rights on occasion of a severance are obtained by the *granted* tenement as against the tenement *retained by the grantor?* but to the question, whether any, and if so, what, rights are obtained by the grantor in favour of the tenement which he retains, as against the tenement which he grants? In *Pyer* v. *Carter*, it was decided that the retained tenement stands in as favourable a position, for this purpose, as the granted tenement. This doctrine appears to be opposed to the maxim upon which the doctrine discussed in the preceding paragraph depends, that a grantor cannot derogate from his own grant; and it seems to have been overruled by the cases of *Suffield* v. *Brown*, 4 De G. J. & S. 185, and *Wheeldon* v. *Burrows*, 12 Ch. D. 31. In *Russell* v. *Watts*, 10 App. Cas. 590, the House of Lords carefully refrained from throwing doubt upon *Wheeldon* v. *Burrows*, and indeed seem to have approved of that case. See also *Taws* v. *Knowles*, 1891, 2 Q. B. 564; which case also shows that there is no distinction in this respect between a mortgage and an absolute conveyance. The doctrine of *Wheeldon* v. *Burrows* was well expressed by Lord Holt in *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, at p. 1093; and is laid down in *Curriers' Company* v. *Corbett*, 4 De G. J. & S. 764.

If the easements are not continuous and apparent, the grantor, in order to revive them, must either employ words of express grant, or must describe them as "used and enjoyed with" the land conveyed, or in similar terms. (*James* v. *Plant*, 4 A. & E. 749; *Barlow* v. *Rhodes*, 1 C. & M. 439, at p. 448.)

Notwithstanding the *dicta* in some early cases, it may now be taken as settled that, agreeably to general principle, easements of necessity, like other easements, are extinguished by unity of seisin, but that upon a severance of the tenements a

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new easement of necessity is newly created if the necessity continues. (*Per* Parke, B., in *Pheysey* v. *Vicary*, 16 M. & W. 484, at p. 491; and see *Holmes* v. *Goring*, 2 Bing. 76.) And the new easement is limited in its extent by the extent of the existing necessity. (*Corp. of London* v. *Riggs*, 13 Ch. D. 798.)

The doctrine, that easements which cannot pass as appurtenant may be granted *de novo* by words denoting user as distinguished from words denoting appurtenancy, was formerly thought to apply only to easements which had existed previously to and had been extinguished by the unity of seisin. (See *Thomson* v. *Waterlow*, L. R. 6 Eq. 36; *Langley* v. *Hammond*, L. R. 3 Exch. 161.) But in recent cases it has been held that the doctrine applies also to easements (or rather, usages in the nature of easements) which have grown up during the unity of seisin. (*Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616.) The two last cited cases show that, in regard to this point, there is no difference between continuous easements and easements which are used only from time to time.

In the case of *Beddington* v. *Atlee*, 35 Ch. D. 317, the following points appear to have been assumed or decided:—(1) The doctrine of implied grant of easements holds good, since the Judicature Acts, with regard to equitable owners, so far as their power to make a title extends; (2) when the adjoining tenements are not held in the same right, as, for example, where the owner of one is seised of the other in trust for another person, the doctrine will not apply; (3) after contracting to sell one tenement, the vendor, being a trustee for the purchaser, is for this purpose seised of it *en autre droit;* and therefore the doctrine will not apply on the sale by him of another adjoining tenement; (4) the point was raised, but not decided, whether an express mention of appurtenances will, by virtue of sub-s. (4), prevent an implied grant, by virtue of sub-s. (2), of easements other than those at the time actually existing as legal easements. This seems to have been decided in the affirmative in *Birmingham, &c. Banking Co.* v. *Ross*, 38 Ch. D. 295, see p. 308. But it could hardly be held that those words would prevent the grant *de novo* of easements which had merely been extinguished by unity of seisin.

The word "enjoyed" in sub-s. (2) refers only to what is enjoyed in such a way as to give rise to a reasonable expectation that the enjoyment will be permitted to continue. (*Per* Cotton, L.J., in *Birmingham, &c. Banking Co.* v. *Ross*, 38 Ch. D. 295, at p. 307.) On the other hand, it may include rights the enjoyment of which has been permissive and precarious only. (*International Tea Stores Co.* v. *Hobbs*, 1903, 2 Ch. 165; *Key* v. *Neath Rural District Council*, 93 L. T. 507.) All the circumstances of each case must be taken into consideration. (*Godwin* v. *Schweppes, Ltd.*, 1902, 1 Ch. 926.)

If the land granted is described as being bounded by a road, the soil of which belongs to the grantor and is not comprised

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in the grant, then, though the road is not a highway, a right of way over it may by implication pass to the grantee. (See *Roberts* v. *Karr*, 1 Taunt. 495; *Harding* v. *Wilson*, 2 B. & C. 96; *Randall* v. *Hall*, 4 De G. & Sm. 343; *Espley* v. *Wilkes*, L. R. 7 Exch. 298.) But it is conceived that there must be some indication of intention beyond a bare mention of the road. In *Randall* v. *Hall*, and *Espley* v. *Wilkes*, the way claimed was a way of necessity; and the question in the former case does not refer to what passes by implication in a grant, but to what should be put into a grant under a contract. In *Harding* v. *Wilson* the words were "an intended way." In *Roberts* v. *Karr* the Court seem to have gone partly on the ground that the road was a highway, and partly on the ground of estoppel; and the ground of estoppel was sufficient, for if the *locus in quo* was a road at all, it could be so only by being taken to be a part of the highway.

As it is the easement which is appurtenant to the dominant tenement, and not the subjection to the easement which is appurtenant to the servient tenement, there seems, so far as the present question is concerned, to be no need for, nor even any meaning in, the distinction between cases of severance in which the dominant tenement is conveyed and those in which the servient tenement is conveyed. No question of appurtenancy, or of the grant of an easement *by the person conveying*, can arise in the latter cases.

The doctrine of grant (or regrant) by words denoting user rests upon the hypothesis that there is an actual user at the time of the grant. With regard to such easements as admit, not only of being extinguished in law by unity of seisin, but of being visibly interrupted and destroyed in fact, they would seem, if so interrupted and destroyed between the execution of the contract and of the conveyance, not to be included under the phrase "easements . . . *at the time of conveyance* demised, occupied or enjoyed with, or reputed, or known as, part or parcel of or appurtenant to the land." This view is confirmed by *Roe* v. *Siddons*, 22 Q. B. D. 224. As the rights of the purchaser date from the contract and not from the conveyance, it follows that, whenever the vendor retains contiguous lands, the contract should expressly provide for the grant of easements admitting of such physical interruption, unless it is certain that none exist.

It is conceived that a purchaser buying upon an open contract could not now insist upon the insertion in the conveyance of express general words. (See s. 66, sub-s. (1), p. 166, *post*.)

As to how far the doctrine of grant by words denoting user applies to rights of common, see *Doidge* v. *Carpenter*, 6 M. & S. 47; *Baring* v. *Abingdon*, 1892, 2 Ch. 374.

Of things parcel of a manor, some, as mines and minerals, admit of severance, and others, as the court-baron (Shep. T. 240), do not; unless upon a grant by the king (Scriv. Cop. 4th ed. 601). The severance here meant is severance from

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the *seignory*, which must not be confused with the corporeal hereditaments in the tenure of the lord. Anything once severed cannot be reunited to the manor so as to become parcel of it (*Revell* v. *Jodrell*, 2 T. R. 415, see p. 419; *Delacherois* v. *D.*, 11 H. L. C. 62); for which reason "mines and minerals" seem to have been inserted amongst the general words relating to a manor, and not among those relating to land. Mines and minerals severed from land can be reunited at will; and the specific mention of things parcel of the thing conveyed not only is useless, but may be dangerous if the enumeration is not exhaustive. (*Denison* v. *Holiday*, 3 H. & N. 670.)

"Warrens and law-days, or view of frank-pledge, will not pass by a grant of the manor, unless they are mentioned, or the grant be of the manor with the appurtenances." (Prest. Shep. T. 240.) They will now pass, unless a contrary intention is expressed. View of frank-pledge, or the court-leet, had become obsolete in Lord Coke's time. (2 Inst. 72.)

By a demise of a manor to which an advowson is appendant, without saying *cum pertinentiis*, the advowson does not pass. (*Higgins* v. *Grant*, Cro. Eliz. 18.) The present section contains nothing to alter this rule.

Covenants for Title.

Sect. 7. Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

A defect of title which by a natural construction comes within the language of the covenants, is not excluded therefrom merely by the fact that it appears on the face of the conveyance, or was otherwise known to the covenantee. (*Page* v. *Midl. Rway. Co.*, 1894, 1 Ch. 11; overruling *Hunt* v. *White*, 37 L. J. Ch. 326; *G. W. R.* v. *Fisher*, 1905, 1 Ch. 316.)

Although the operation of this Act is restricted to England and Ireland, any of the provisions of this section might, by express declaration contained in any particular deed, be

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extended by reference to apply to conveyances of land situated elsewhere.

On conveyance for value, by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

The word *conveys* will probably be held to mean, *is named as a conveying party in the operative part of the conveyance.* Sub-s. (4), *infra*, uses only the phrase *expressed to convey*. It would seem that the use of the words *as beneficial owner conveys* will carry the covenants, even if the party purporting to convey is not in fact a *beneficial owner*, nor does in fact convey anything, but only joins in the conveyance for the purpose of entering into the covenants.

"Conveyance" does not, in this section, include "demise by way of lease at a rent": see sub-s. (5) and note thereon, p. 48, *post*. "Conveyance for valuable consideration" seems here to include a settlement made in consideration of marriage; although the words "purchase for value," occurring in the covenant, do not. To such settlements the forms (A.) and (B.) seem to apply, as well as the form (E.), thus enabling the settlor, by using the appropriate language, to adopt either set of covenants at will. This opinion seems to be commonly adopted in the profession, and it is in accordance with the usual practice at the passing of the Act; by which covenants for title were carried up to the last purchase for money, or money's worth, not stopping short at a conveyance in consideration of marriage.

The voluntary surrender of a lease, not being for any valuable consideration, seems not to be capable of containing these implied covenants; and in such case an express covenant against incumbrances should be inserted in the deed of surrender. The same end might be attained by the use of the words "as trustee," or "as mortgagee," by virtue of (F.), p. 46, *post;* but such use of the words is not appropriate to the circumstances.

The covenant will not operate to enlarge the thing granted. In a case where a share in a testator's residuary estate was liable, under certain circumstances, to a deduction of 50*l. per annum* for the board and lodging of the legatee, it was held that a purchaser of the share took it subject to that liability, when the circumstances arose, although it was conveyed by the legatee as beneficial owner. (*Re Greenwood, Priestley* v. *Griffiths*, W. N. 1892, p. 20; 40 W. R. 357.)

Right to convey.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys,

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has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any

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estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

This follows the common form of covenants for title in the conveyance of an absolute interest. The phrase, "share of subject-matter," is strictly appropriate only to tenants in common. One tenant in common who purports to convey an undivided share is liable only for his aliquot share of the damages resulting upon a breach. (*Sutton* v. *Baillie*, 65 L. T. 528.) In the case of persons interested otherwise than as tenants in common, it is usual to qualify the extent of the covenants to which, under the form of the conveyance, they would be liable, by a restrictive proviso; forms of which will be found in the collections of precedents. A proviso of this description is valid by virtue of sub-s. (7), p. 49, *infra*.

It will be observed that the covenants for title implied in this sub-section only extend to "the subject-matter expressed to be conveyed." Consequently if the operative part of the conveyance is limited to the vendor's interest "if any" in the property, the covenants are of but little value: see and consider *May* v. *Platt*, 1900, 1 Ch. 616.

The occurrence of a purchase for value in the title, puts a stop to the running back of the covenant. Title is derived from

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all the earlier links through each one of the succeeding links; and if the derivation through one of the latter is "by purchase for value," the derivation from each of the former is also, among other things, "by purchase for value."

Covenants implied by virtue of this section will prevent a bill of sale given by way of mortgage from being "in accordance" with the form given in the schedule to the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, which contains no covenants for title; and such a bill of sale will be void under s. 9 of the Act. (*Ex pte. Stanford, Re Barber*, 17 Q. B. D. 259.)

The apportioned expenses of paving a new street, incurred under the Metropolis Management Amendment Act, 1862, are not an incumbrance within the meaning of this implied covenant against incumbrances. (*Egg* v. *Blayney*, 21 Q. B. D. 107.) But such expenses come within the covenant, if incurred under the Public Health Act, 1875 (*Re Bettesworth and Richer*, 37 Ch. D. 535); or under the Private Street Works Act, 1892. (*Stock* v. *Meakin*, 1899, 2 Ch. 496; 1900, 1 Ch. 683.)

A purchaser in fee simple from a person who had purchased from a trustee in bankruptcy, has no remedy under these covenants, if evicted from the actual possession by a lessee who claims through the bankrupt otherwise than through the trustee. (*Woodward* v. *Corp. of Margate*, 2 Times L. R. 829.)

A lessee, who had incumbered his lease by sub-demise, surrendered to his lessor for valuable consideration, concealing the incumbrance. The lessor subsequently sold the fee simple free from incumbrances, conveying as beneficial owner. It was held in C. A. that he was liable under the statutory covenant. (*David* v. *Sabin*, 1893, 1 Ch. 523.)

As to the distinction between an incumbrance on the thing conveyed, and the case where the thing conveyed is intrinsically a part of a possibly larger whole, see *Re Greenwood, Priestley* v. *Griffiths*, W. N. 1892, p. 20; 40 W. R. 357. If a share of a testator's residuary estate is liable to be diminished in certain events, a conveyance of the share *simpliciter* is a conveyance of a thing intrinsically liable to diminution; and a conveyance as beneficial owner implies no warranty against such diminution.

For some information as to the measure of the damages on a breach, see *Sutton* v. *Baillie*, 65 L. T. 528.

Where the breach of covenant implied by the section consists in the non-disclosure of a right of way granted by the vendor, the proper measure of damages is the difference between the value of the property as purported to be conveyed and the value as the vendor had power to convey it. (*Turner* v. *Moon*, 1901, 2 Ch. 825.)

The covenant is one of indemnity. Consequently when the vendor conveyed land without reservation, and the purchaser had to pay compensation to the person entitled to a right of way, although the purchaser had notice of its existence both on the face of and outside the conveyance, the vendor was held liable to repay such compensation with interest thereon and the costs which the purchaser had been ordered to pay in the

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proceedings, fixing the amount of the compensation and the purchaser's costs of such proceedings as between solicitor and client. (*G. W. R.* v. *Fisher*, 1905, 1 Ch. 316.) But the vendor was not ordered to pay the costs of an unsuccessful attempt by the purchaser to avoid paying the amount of the compensation (*S.C.*).

A covenant for further assurance is a covenant to clear off any incumbrance not referred to in the conveyance. (*Re Jones, Farrington* v. *Forrester*, 1893, 2 Ch. 461, 472.)

On conveyance of leaseholds for value, by beneficial owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Here "conveyance" includes the assignment of an existing lease, but not the grant *de novo* of a lease at a rent. (See sub-s. (5), p. 48, *infra*.)

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

This enactment does not provide for the usual covenant by the purchaser to indemnify the vendor for the future against rent and covenants; which must, therefore, be expressly inserted in assignments of leaseholds. Without any express

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covenant on the part of the assignee, he will be liable to indemnify the original lessee against damages for any breach of covenant occurring during such assignee's own tenancy. (*Moule* v. *Garrett*, L. R. 7 Exch. 101.) There is usually a chain of successive covenants, whereby, by means of successive actions, the original lessee suing the first assignee, the first assignee suing the second, and so on, the liability might unquestionably be cast in the end upon the person during whose tenancy the breach had occurred. But the above-cited case does not rest upon this ground, or upon the principle that what may be done circuitously may in many cases be done directly, but upon the principle that, without any express contract, there is an implied contract on the part of each successive holder of the lease, to perform the covenants entered into by the original lessee, and in default thereof, to indemnify him against liability for breaches committed during the tenancy of such holder. Upon the same principle the transferee of shares in a company, which are liable to calls, is under an implied contract to indemnify the transferor against such calls. (*Roberts* v. *Crowe*, L. R. 7 C. P. 629.) If an intermediate holder surrenders a part of the lands, the covenants are apportionable and the above-stated principle applies to the apportioned covenants. (*Baynton* v. *Morgan*, 22 Q. B. D. 74.)

On mortgage, by beneficial owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person

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not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Freedom from incumbrance.

Further assurance.

This seems not to differ in any material respect from the forms of covenant in common use before the Act.

On mortgage of leaseholds by beneficial owner.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

See note on sub-s. (5), p. 48, *infra*.

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That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Validity of lease.

Payment of rent and performance of covenants.

It is conceived that this form will be held to apply to mortgages by demise; though its language is well adapted only to mortgages by assignment. See *Capital and Counties Bank* v. *Rhodes*, 71 L. J. Ch. 573, reversed on other grounds, 1903, 1 Ch. 631.

On settlement.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

For further assurance, limited.

That the person so conveying, and every person deriving title under him by deed or act or

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operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

Marriage settlements sometimes contain covenants for title similar to those contained in conveyances on sales. Voluntary settlements seldom contain any, beyond (at most) a covenant for further assurance.

It is conceived that, in a marriage settlement, the use of the words "as beneficial owner" by the settlor will cause to be implied as against him the covenants specified in (A.) or (B.), *supra*, as the case may require. (See note, p. 38, *ante*.)

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof,

in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

The second half of this sub-section seems to be merely explanatory of the first. Its apparent object might (sub-s. (2), *supra*) be secured by expressing that the wife conveys both as beneficial owner, and also by the direction of the husband directing as beneficial owner.

By the M. W. P. Act, 1882, s. 1, sub-s. (3), any contract made by a married woman after December 31, 1882, will bind her separate estate, "unless the contrary be shown." Before the coming into operation of that Act, a *feme covert* could not covenant; and her separate estate was, strictly speaking, not bound by her covenant, but only in equity by her declaration of intention in that behalf.

The concurrence of the husband will not be needed in conveyances by a wife of property the title to which has accrued after the commencement of the Act, or by a wife, if married subsequently to such commencement, of property the title to which has accrued before such commencement.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal

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representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

Here "conveyance" seems to include a demise by way of mortgage; that not being by way of lease at a rent; unless, perhaps, in cases where the mortgagor attorns tenant to the mortgagee. But even in the last-mentioned cases, it is conceived that the covenants for title would be implied by the use of the words "as beneficial owner." The present sub-section seems to aim at including all "conveyances" which usually contain covenants for title under such forms as are above set forth, and at excluding those which do not usually contain them.

The right to admittance can in general only be conferred by *surrender*, though by the special custom of some manors (see *Thompson* v. *Hardinge*, 1 C. B. 940) it may be conferred by deed. But "conveyance" by s. 2, sub-s. (v.), p. 13, *ante*, includes covenant to surrender made by deed.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

It is conceived that the last words of this sub-section mean, *in whom any part of the property is vested, for the whole estate or interest, in that part, of the implied covenantee;* and that they would not apply to the tenant of an *estate carved out of* the estate of the implied covenantee.

The benefit of the usual covenants for quiet enjoyment and further assurance undoubtedly runs with the land. (See 1 Smith, L. C. 8th ed. p. 80; 9th ed. *ibid.*)

If a deed, in which covenants for title are contained, fails to pass any estate, either in fact or by estoppel, the assigns of the original covenantee cannot sue upon the covenant. (*Onward Bdg. Soc.* v. *Smithson*, 1893, 1 Ch. 1.)

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(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

It seems that the deed by which the covenant may be varied or extended is not necessarily the conveyance in which the covenant is implied.

(8.) This section applies only to conveyances made after the commencement of this Act.

Execution of Purchase Deed.

Sect. 8. Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this Act.

This section does not extend to mortgages. "Sale" means only a "sale properly so called." (See s. 2, sub-s. (viii.), p. 14, *ante*.)

Viney v. *Chaplin*, 2 De G. & J. 468, decided that, where no special circumstances existed to make the demand unreasonable, the purchaser was entitled (1) to have the conveyance executed in the presence of his solicitor; (2) to pay the purchase-money to the vendor himself.

Essex v. *Daniell*, L. R. 10 C. P. 538, decided that the question whether such demand was reasonable was a question for the jury.

It seems that the vendor may now insist upon executing the conveyance in the absence of the purchaser, but that the purchaser may specially appoint a person to attest such execution.

The definition of "conveyance" (s. 2, sub-s. (v.), p. 13, *ante*) does not include a surrender of copyholds. This section, therefore, does not extend to such surrenders, though it extends to the execution of covenants to surrender. Surrenders must be made in person, if demanded, except in special cases of disability. (Scriv. Cop. 4th ed. 127.) Any person entitled to admittance may be admitted by his attorney duly appointed,

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whether orally or in writing. (Copyhold Act, 1894, s. 84, sub-s. 2; replacing Copyhold Act, 1887, s. 2.)

It is conceived that this section only applies in the absence of and subject to any express contract between the parties.

A "sale" seems to be "made" as soon as a binding contract has been concluded.

As to the payment of purchase-money to the vendor's solicitor, see s. 56, p. 150, *post*.

Production and Safe Custody of Title Deeds.

Sect. 9. Acknowledgment of right to production, and undertaking for safe custody of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

The language of this section is very wide in its terms; but it is conceived that the effect will practically be restricted to persons having possession of the documents by some lawful title on the one hand, and to persons taking some estate or interest in the property to which the documents relate on the other. This can be effected, if not by construction, by a judicious exercise of the discretion reposed in the Court under sub-s. (7), *infra*.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or

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under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accord-

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ingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

The ordinary covenant for production (as distinguished from safe custody) of title-deeds, in most cases only expressed and gave a *legal* remedy in respect of a right which could be enforced in *equity*, independently of express contract. (Dart, V. & P. 7th ed. p. 483, ch. 9, s. 2. See *Fain* v. *Ayers*, 2 Sim. & Stu. 533.) But the purchaser was ordinarily entitled to a valid covenant for the production, and probably for the right to take copies, of title-deeds not delivered to him. (Dart, p. 696, ch. 12, s. 6.) For the liability to give this covenant is now substituted (sub-s. (8)) the liability to give an acknowledgment.

Although the word "retains" is not properly applicable to a person who receives possession for the first time, yet there is little doubt that this section will be held to extend to such cases.

The substitution of an "acknowledgment" in the place of the old covenant for production has become universal in practice, as also has the substitution of an "undertaking" in the place of the covenant for safe custody. For some remarks upon the relative advantages of the old and the new practice, see the next note. It is of essential importance to ascertain that the person who professes to give an "acknowledgment" or "undertaking," has the documents at least under his control at the time of giving them, since the benefit of them is not obtained unless the person giving them "retains possession of" the documents. It also seems that the person claiming the benefit must be prepared to prove this matter of fact. Probably the presumption will be held to lie in favour of the custody of the documents having gone as indicated by the title. But, if this presumption should be rebutted by actual proof that the person giving the "acknowledgment," &c., had not in fact the documents, either in his possession or under his control, at the time of giving it, the Act seems to give it no validity whatever. The old covenant had this advantage, that it equally bound the covenantor, whether he had or had not the documents in his possession. A mortgagee who joins in the conveyance of a part of the mortgaged property, and retains the deeds, is a necessary party to the acknowledgment. (*Grainge* v. *Wilberforce*, 5 Times L. R. 436.) If he refuses to give it, the vendor must enter into the analogous covenant for the production of the deeds. (*Re Pursell and Deakin*, W. N. 1893, p. 152.)

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(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, or undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

The effect of an acknowledgment coupled with an undertaking appears to be nearly equivalent to that of the restricted

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covenant usually given by fiduciary vendors before the passing of the Act. It is difficult to give any reason why the passing of the Act should alter the practice, since it contains no provision for so doing; but a diversity in practice has sprung up since the Act, some conveyancers requiring only an acknowledgment from fiduciary vendors, others requiring an undertaking also. Though the practice of requiring the above-mentioned covenant from fiduciary vendors is not of great antiquity, it was, previously to the passing of this Act, so thoroughly established that, as it imports nothing intrinsically unreasonable, fiduciary vendors ought, in the absence of express stipulation, to be compelled to enter into the covenant; and, therefore, to give both acknowledgment and undertaking. The Act contains nothing to reduce their liability, though the liability of ordinary vendors, who seem now to be placed upon the same footing as fiduciary vendors, is reduced. It is now a not uncommon practice for fiduciary vendors to stipulate, especially in conditions of sale by auction, that they shall be bound only to give an acknowledgment. Ordinary vendors, giving both an acknowledgment and an undertaking, seem to stand in nearly the same position as when their ordinary covenant under the former practice was qualified by a proviso for determining the liability upon their procuring a substituted covenant from any person to whom they might deliver the deeds. But, in the absence of stipulation, it seems that ordinary vendors could not formerly have insisted upon the insertion of this proviso; and the pr oviso usually cast the expense of procuring the substituted covenant upon the vendor. The principal difference between their present position and their position under the covenant qualified by the proviso (apart from the expense of procuring the substituted covenant) seems to be, that they are now under no obligation, by virtue of the undertaking, to give notice to the covenantee of a change in the ownership or custody of the deeds. This difference makes the effect of an acknowledgment coupled with an undertaking much less beneficial to purchasers than the old covenant qualified by the proviso.

It seems sometimes to have been thought that in *Re Agg-Gardner*, 25 Ch. D. 600, Bacon, V.-C., expressed an opinion that a fiduciary vendor is not bound to give an undertaking. The case appears to have been decided upon other grounds; and the opinion expressed by the learned V.-C. was that, under the special circumstances, the vendors could not be called upon to give either an acknowledgment or an undertaking.

It will be observed that in sub-s. (9), *supra*, there is nothing to except trustees, who come into possession of documents impressed with an "undertaking" previously given, from the liability imposed by the sub-section.

Though the Act has omitted to make the release of a holder's liability depend upon his handing the deeds to a lawful claimant, it is desirable that a person parting with title-deeds affected by acknowledgments, &c., should be careful to deliver them to the person legally entitled to receive them.

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The following rules as to the custody of, and right to, title-deeds, may here be noted:—

(1.) The right to the custody usually follows the right to the estate, and the necessity for production of the deeds in order to protect the estate. (*Ld. Buckhurst's Case*, 1 Rep. 1.)

(2.) If several persons have each an equal right to the custody, he who actually has the deeds is entitled to retain them. (*Davies* v. *Vernon*, 6 Q. B. 443; *Foster* v. *Crabb*, 12 C. B. 136.) And this rule applies as between trustees. (*Re Sisson's Settlement, Jones* v. *Trappes*, 1903, 1 Ch. 262.)

(3.) A legal tenant for life, beneficially entitled in his own right, is entitled to the custody, as a matter of right. (*Strode* v. *Blackburn*, 3 Ves. 222, at p. 225; *Garner* v. *Hannyngton*, 22 Beav. 627.) This rule does not necessarily apply to persons becoming entitled to a life estate by operation of law, or by assignment; as to whom, see par. 9, *infra*. An equitable tenant for life, if he has obtained the custody of the deeds, is allowed to retain them. (*Taylor* v. *Sparrow*, 4 Giff. 703. See also *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391.)

(4.) The Court will interfere with the right of the legal tenant for life only when their safety is endangered by his fault, or where they are required by the Court for purposes of administration. (*Leathes* v. *Leathes*, 5 Ch. D. 221; *Stanford* v. *Roberts*, L. R. 6 Ch. 307.) In the former case the Court refused to order the deeds to be brought into Court by the tenant for life at the instance of the remainderman, merely on the ground that the remainderman's title to a part of the estate was disputed, and that the tenant for life might prejudice him by showing the title to an adverse claimant.

(5.) It seems that the mere fact that a tenant for life is out of the jurisdiction will not interfere with his right to the custody. (*Leathes* v. *Leathes*, *ubi supra*. See, however, *Jenner* v. *Morris*, L. R. 1 Ch. 603.)

(6.) The rule laid down by V.-C. Wood, in *Warren* v. *Rudall*, 1 J. & H. 1, that, though the Court will not interfere as between a father tenant for life and a son entitled in remainder, it will interfere as between two strangers standing in the same positions, was denied to be law by Jessel, M.R., in *Leathes* v. *Leathes*, *ubi supra*, at p. 223, and would probably not be sustained.

(7.) An equitable tenant for life (who happened to be also one of the trustees) was held to be entitled, on a mortgage being paid off, to have the title-deeds delivered to him, and not to the trustees generally, upon undertaking not to part with them without the consent of the trustees, and to produce them to the

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trustees upon all reasonable occasions. (*Re Burnaby's S. E.*, 42 Ch. D. 621.) The fact that he was one of the trustees seems not to have made any difference. Nor, in the absence of special circumstances, does it make any difference if the estate of the equitable tenant for life is determinable on bankruptcy or alienation. (*Re Wythes, West* v. *Wythes*, 1893, 2 Ch. 369.)

(8.) An equitable tenant for life is generally entitled to be let into possession; and it is no conclusive objection that such tenant for life is a female. If an equitable tenant for life has mortgaged his life interest, the mortgagee may insist upon the title-deeds being retained by the trustees. (*Re Newen, N.* v. *Barnes*, 1894, 2 Ch. 297.)

(9.) A husband is entitled, while in receipt of the rents of his wife's lands, to the custody of the title-deeds; but the above-stated rule as to the right of a legal tenant for life does not apply to his trustee in bankruptcy. (*Ex pte. Rogers, Re Pyatt*, 26 Ch. D. 31.) It is doubtful whether the rule applies to his express assignee. (*Ibid. per* Cotton, L.J., at p. 33.)

(10.) When deeds are in the hands of a person claiming no title, they cannot be recovered from him by a person entitled to a portion only of the lands to which they relate; but in such a case the deeds will be ordered to be brought into Court. (*Wright* v. *Robotham*, 33 Ch. D. 106.)

(11.) The legal tenant for life will not be permitted to hand over the title-deeds to another person to the prejudice of the remainderman; but in such a case the Court will interfere. (*Ford* v. *Peering*, 1 Ves. 72.)

(12.) A mortgagor who executes a first mortgage by order of the Court, is bound to deliver to the mortgagee the title-deeds if in his possession. (*Stokes* v. *S.*, W. N. 1886, p. 184.)

A trustee is justified in depositing title-deeds with his solicitor, if they require to be frequently inspected. (*Field* v. *F.*, 1894, 1 Ch. 425.)

An acknowledgment and undertaking, when executed separately from the conveyance, are not necessarily under seal, and it seems that they require only a 6*d.* agreement stamp. Whether an acknowledgment alone requires any stamp, might be open to doubt. But in the absence of judicial decision, it will be wise to affix a 6*d.* stamp; and the authors are informed that the authorities at Somerset House insist that the stamp is necessary.

III.—Leases.

Sect. 10. Rent and benefit of

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein

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lessee's covenants to run with reversion.

contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

It is conceived that the words "lease" and "lessee" must have in this section the same meaning as in the 32 Hen. 8, c. 34, where they include leases for life or lives and terms of years, but not estates tail. (Co. Litt. 215 a, resolution 3.) On the meaning of *firmarii*, see 2 Inst. 145. On the meaning of the words "lessor" and "lessee," see Litt. s. 57. *Qu.* whether "lease" includes an agreement for a lease. (*Manchester Brewery Co.* v. *Coombs*, 1901, 2 Ch. 608.)

It is also conceived that the words "having reference to the subject-matter thereof," must be interpreted to restrict the covenants and conditions contemplated by this section to those which are within the 32 Hen. 8, c. 34. ("The covenants whereof grantees by this statute shall take advantage are inherent covenants; *i.e.*, such covenants as do concern the thing granted, and tend to the supportation of it." Shep. T. 176. And see the remark at the end of this note, p. 60, *infra*.)

This section deals with three distinct subjects, which are often confused together:—(1st) The apportionment of *rent* reserved by a lease, so far only as regards the *right to recover* it, not as regards the right to re-enter, under a condition or proviso for re-entry upon non-payment of the rent; (2ndly) the apportionment of the benefit of lessee's *covenants* contained in a lease, so far only as regards the right of the reversioner to sue for *damages* for a breach, not as regards the right to re-enter, under a proviso for re-entry upon a breach of the covenant; and (3rdly) the apportionment of *conditions* contained in a lease, which concerns the right to re-enter upon a breach.

As regards the first branch, this section seems to add nothing to the rights given by the common law to *legal* owners of reversions. As regards the second branch, it is doubtful whether the section adds anything to the rights given by the 32 Hen. 8, c. 34, to such *legal owners*. But the words "entitled . . . to the income," seem to include *equitable* owners also. As

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regards the third branch, the change made in the law by this section is still more important.

It is conceived that the words, "condition of re-entry," do not include a right of entry for condition broken which has accrued previously to the assignment of the reversion, and that the assignee cannot now, as formerly he could not, take advantage of such a right. (See Litt. s. 347.) The 8 & 9 Vict. c. 106, s. 6, does not appear to authorize the assignment of a right of entry which has accrued by the breach of a condition. (*Hunt* v. *Bishop*, 8 Exch. 675, at p. 680; *Hunt* v. *Remnant*, 9 Exch. 635, at p. 641; *Crane* v. *Batten*, 2 W. R. 550.) A continuing breach, as of a covenant to repair, will of course give to the assignee a new right of entry accruing after the assignment. (*Bennett* v. *Herring*, 3 C. B. N. S. 370.)

(I.) As to the apportionment of rent reserved by a lease, upon a severance of the reversion in a part of the lands from the reversion in another part, so far only as regards the right to recover the apportioned rent.

If the rent consists of money, or anything admitting of subdivision (but not otherwise, Litt. s. 222), it is apportionable at common law upon such a severance, whether the severance is effected by surrender of a part of the lands (Co. Litt. 148 a); or by a grant or devise of the reversion in a part (*Ibid.*; 2 Inst. 504; *Collins and Harding's Case*, 13 Rep. 57); or by re-entry of the reversioner upon a part only, under a special condition (*Ibid.* at p. 58); or by eviction of the tenant from a part, by a title paramount to that of the lessor (*Smith* v. *Malings*, Cro. Jac. 160); or by a partition among coparceners of the reversion (*Ewer* v. *Moyle*, Cro. Eliz. 771); or by the different descent of the reversion in different parts of the lands; as where borough-English and common lands are comprised in a single lease. (*Ibid.*)

The apportionment is according to the respective values of the severed parts. If the lessee is not a party, he is not, by an apportionment agreed upon between the reversioner and his grantee, precluded from insisting that the apportionment shall be legally made by a jury. (*Bliss* v. *Collins*, 5 B. & Ald. 876.)

(II.) As to the apportionment of the benefit of lessee's covenants contained in a lease, upon such a severance as above mentioned, so far only as regards the right of the reversioner to sue for damages.

Two questions arise:—whether the benefit will pass (1) to an assign of the whole reversion; (2) to an assign of the reversion in a part.

Although the burden of the lessee's covenants (the covenants being what are commonly styled "inherent" covenants, and not collateral) would, at common law, pass to an assign of the *lands*, *i.e.*, the particular estate upon which the reversion was

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expectant, yet at common law the reciprocal benefit probably did not pass to an assign of the *reversion* (1 Wms. Saund. 299); so that the latter could sue neither the lessee nor the lessee's assigns for a breach of the lessee's covenants.

But, by the 32 Hen. 8, c. 34, s. 1, the benefit of the lessee's covenants, provided that they are what are called inherent covenants, passes to an assign of the reversion. The statute provides, that all grantees or assignees of any reversion of any hereditaments, and their heirs, executors, successors and assigns, shall have and enjoy like advantages against the lessees, their executors, administrators and assigns by entry for non-payment of the rent, or for doing of waste, or other forfeiture; and, also, every such like advantage, benefit and remedies *by action only*, for not performing of other conditions, *covenants or agreements* contained in their leases against the lessees, their executors, administrators and assigns, as the lessors themselves, their heirs or successors, might have had and enjoyed.

The statute only applies to leases by deed. (*Manchester Brewery Co.* v. *Coombs*, 1901, 2 Ch. 608.)

On the whole subject since the statute, both as to what covenants are qualified to run, and when they will run, with the land, and also with the reversion, see *Spencer's Case*, 5 Rep. 16; and the notes thereto in 1 Smith, L. C.

It is to be observed that, according to the second resolution in *Spencer's Case*, which is often misapprehended, the naming of the assigns *on the part of the covenantor* will, in certain cases, cause a covenant to be inherent which would not otherwise be inherent. These cases are, where the covenant affects something which is not parcel of the thing demised at the date of the covenant, but which will, when it comes into being, be such parcel.

The benefit of the lessee's covenants would, previously to the present section, have passed to the assign of the reversion in a part of the lands, so far as the covenants referred to that part. (*Twynam* v. *Pickard*, 2 B. & Ald. 105; and see *Henniker* v. *Turner*, 4 B. & Cr. 157; *Walter* v. *Maunde*, 1 Jac. & W. 181; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.) Similarly, the burden of a covenant to repair, being divisible, would have passed to an assign of part of the lands. (*Congham* v. *King*, Cro. Car. 221.)

It is conceived that the wide language of this section must be subjected to a similar restriction; and that the owner of the reversion in a part can enforce only such covenants as refer to that part.

(III.) As to the apportionment of conditions contained in a lease, notwithstanding such a severance of the reversion as above mentioned.

Here, also, we have to consider the effects of (1) assignment; (2) severance.

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"By the common law, no grantee or assignee of the reversion could take advantage of a re-entry, by force of any condition." (Co. Litt. 215 a.)

The words of the above-cited Act of 32 Hen. 8, "by entry, for non-payment of the rent, or for doing of waste, or other forfeiture," extend the benefit of entry for a breach to breaches of other conditions besides a condition for re-entry upon non-payment of rent. But only to "such conditions as either are incident to the reversion, as rent, or for the benefit of the estate, as for not doing of waste, for keeping the houses in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like, . . . so as *other forfeiture* shall be taken for other forfeiture like to those examples which were there put, viz., of payment of rent, and not doing of waste, which are for the benefit of the reversion." (Co. Litt. 215 b, resolution 12.)

By a "condition incident to the reversion, or for the benefit of the estate," Lord Coke seems here to mean a condition of re-entry for the not doing of something which is incident to the reversion, or which is for the benefit of the estate.

The assignee of a *particular estate carved out of the reversion in the whole of the lands* might take advantage of conditions. (*Ibid.* 215 a, resolution 4.)

But (except as next hereinafter mentioned) the assignee of the reversion in *a part of the lands* could not (previously to the present section) take advantage of conditions. (*Ibid.* resolution 5; *Dumpor's Case*, 4 Rep. 119; see also *Knight's Case*, 5 Rep. 54.)

The exceptions to the above rule were (1) the king (Co. Litt. 215 a, see resolution 6); and (2) an assignee taking by act of the law only; as where borough-English lands and common law lands are comprised in the same lease, and the reversion descends upon different heirs. (*Ibid.* resolution 7.)

And as to the apportionment of conditions of re-entry for non-payment of rent, see Lord St. Leonards' Act, s. 3.

22 & 23 Vict. c. 35, s. 3.

> "Where the reversion upon a lease is severed, and the "rent or other reservation is legally apportioned, the "assignee of each part of the reversion shall, in respect "of the apportioned rent or other reservation allotted or "belonging to him, have and be entitled to the benefit of "all conditions or powers of re-entry for non-payment of "the original rent or other reservation, in like manner as "if such conditions or powers had been reserved to him "as incident to his part of the reversion in respect of the "apportioned rent or other reservation allotted or "belonging to him."

In the present section, the words, "notwithstanding severance of that reversionary estate," suggest that the operation of the preceding part of the section is restricted to altering the law touching *severance*, and that only those covenants and conditions are within its scope which are within the 32 Hen. 8, c. 34. (See Co. Litt. 215 b, resolution 12, cited above.) The subsequent

part of the section seems to annex to the beneficial ownership for the time being the right to enforce covenants contained in a lease granted by a tenant for life, whether equitable or legal, and whether in exercise of his statutory power of leasing, or in exercise of a power conferred by the settlement. The section does not seem to contain anything to confer upon the beneficial owner a power of distress, in cases where he has not the legal estate. The words "severance of the reversion" are commonly employed to signify what takes place when the reversion in a part of the lands is conveyed to one person, while the reversion in another part is conveyed to, or remains vested in, another person. It would seem from a remark of Fry, L.J., in *Municipal, &c. Bdg. Soc.* v. *Smith*, 22 Q. B. D. at p. 73, that in the opinion of the learned judge a mortgage in fee made of lands subject to a lease, effects a severance of the reversion upon the lease.

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11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

Sect. 11. Obligation of lessor's covenants to run with reversion.

This section deals with the running of the *burden* of the *lessor's* covenants with the reversion notwithstanding severance.

The section has in no way altered the old law as to the class of covenants the burden of which will run with the land. (*Per* Cozens-Hardy, L.J., in *Davis* v. *Town Properties Investment Corp.*, 1903, 1 Ch. 797.) Consequently the section does not bind the reversioner in respect of the use of other land acquired by him since the date of the lease, as this was outside the scope of the covenant for quiet enjoyment under the old law. (*S. C.*, affirming 1902, 2 Ch. 635.)

It is conceived that reversions upon leases for life or lives and

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terms of years are within this section, but not reversions upon estates tail. (See note to s. 10, *ante*.)

The 32 Hen. 8, c. 34, s. 2, gives to all farmers, lessees and grantees of any hereditaments for term of years, life, or lives, their executors, administrators and assigns, the like action, advantage, and remedy against all persons and corporations, having any grant of the reversion of the same hereditaments, *or any parcel thereof*, for any condition, covenant, or agreement contained in their leases, as the lessees might have had against the lessors, their heirs and successors.

The words, "if and as far as the lessor has power to bind the reversionary estate," &c., and, "if and as far as the lessor has power to bind the person," &c., seem to mean, that the covenants may be enforced against any person for the time being in of the reversion, as against whom the term is valid.

Only legal owners of the reversion are liable; but they will be liable without any reference to the question, how they came into the reversion. For example, if the lease be (validly) granted by a tenant for life under a power, whether statutory or otherwise, the covenants will (if the construction proposed in the last preceding paragraph is correct) be binding upon the person entitled in remainder after the death of the tenant for life.

Sect. 12. Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

This section deals with the running with the reversion, notwithstanding severance of the benefit of conditions annexed to the estate of the lessee, a subject which has already been fully dealt with in s. 10, *ante*. (See note thereon.)

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The words in s. 10, "and every condition of re-entry and other condition therein contained," seem to have been left in the Act by inadvertence, when s. 12 was inserted.

One coparcener cannot enter alone for a breach. (*Doe* v. *Lewis*, 5 A. & E. 277.)

Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, Lord St. Leonards' Act, s. 3 (cited above, note to s. 10, at p. 60, *ante*), provides for the apportionment of conditions of re-entry *for non-payment of the rent.*

Sect. 13. On sub-demise, title to leasehold reversion not to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

This section has been noted in connection with s. 3, sub-s. (1), p. 16, *ante*, to which it properly belongs.

When an intending lessor, himself holding by sub-lease, contracts to grant a sub-sub-lease, his intending lessee cannot "call for the title to" the reversion upon the estate of the intending lessor; that is to say, the sub-lease vested in him, out of which the intended sub-sub-lease is to be derived. This seems to mean, that he may call for the sub-lease itself, but not for the title of the person granting it.

It may sometimes be advisable, in such contracts, for the intending lessee to stipulate that the original lease shall be produced, and the title duly deduced thereunder.

The word "sub-demise" in the marginal note is misleading, and not consistent with the rest of the marginal note.

In the case of *Gosling* v. *Woolf*, 1893, 1 Q. B. 39, it seems to have been held by a Divisional Court of the Queen's Bench Division, that a vendor, who has contracted to sell an under-lease, is bound to furnish an abstract of the title to the lease out of which the underlease was derived. The present section, which was cited and discussed, seems to have no bearing upon the case.

Forfeiture.

Sect. 14. Restrictions on and relief

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of

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against forfeiture of leases.

[See Conv. Act, 1892, ss. 2, 3, 4, and 5, pp. 202—206, *post.*]

any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

In some leases the proviso for re-entry stipulates that notice shall be given before a forfeiture is enforced. (See Davidson, Conv. Prec. 3rd ed. Vol. V. pp. 156, 189, 392.) Any terms or restrictions imposed on the lessor by the proviso in the lease must of course be complied with, in addition to those imposed by this enactment, so far as they are not identical.

In *In re Serle, Gregory* v. *Serle*, 1898, 1 Ch. p. 657, it was stated by Kekewich, J., that a notice requiring the tenant to remedy the breaches of covenant within one month or a reasonable time thereafter was valid, although a covenant in the lease provided that repairs should be done within three calendar months after notice. The point, however, did not arise for decision, as the notice was held insufficient on other grounds. In *Penton* v. *Barnett*, 1898, 1 Q. B. 276, Rigby, L.J., said (p. 280) that it could not be doubted that the time indicated by a notice given under the section was reasonable, as it was the time specified in one of the covenants to repair contained in the lease.

The words, "by action, or otherwise," seem to be emphatic; and the lessor's right of entry upon a breach does not arise (except in the cases referred to in sub-sects. 6 and 8, *infra*) until he has complied with the formalities prescribed by this sub-section. Therefore the lessor cannot obtain possession peaceably without action until he has given the notice required by this sub-section. (*Re Riggs*, 1901, 2 K. B. 16.) It will be in the discretion of the Court to grant relief against a lessor who has entered into possession without having given the required notice, upon the terms upon which relief would have been given in an action of ejectment. The sub-section, however, does not appear to make such an entry simply illegal, but only to expose the lessor who makes it to a risk that his title may be re-opened by the Court.

"A right of re-entry . . . shall not be *enforceable*": the Act does not merely say, shall not be *enforced*, which might relate only to getting judgment. A right which is not *enforceable* by action can hardly be a sufficient ground to maintain the action. It therefore seems that the prescribed notice must be served by the lessor, and that he must wait a "reasonable time" before

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he issues the writ, even if the writ only claims a declaration of forfeiture. (*Wilson* v. *Rosenthal*, 22 Times L. R. 233.)

But where the tenant of a licensed house has committed a breach of covenant which entitles the landlord to re-enter and endangers the licence, the Court will appoint a receiver upon the application of the landlord before any notice has been given to the tenant under the section. (*Charrington & Co.* v. *Camp*, 1902, 1 Ch. 386.)

A sufficient notice is a condition precedent to enforcing the forfeiture. (*Horsey Estate* v. *Steiger*, 1899, 2 Q. B. 79.) And the notice must be reasonable; therefore a notice to repair served two days before action brought was held bad. (*S. C.*)

Where the reversion is in mortgage, the notice must be given by the mortgagee. (*Matthews* v. *Usher*, 1900, 2 Q. B. 535.)

It has been held that the word "and," which occurs before the words "in any case," is strictly cumulative. (*Law* v. *Bradshaw*, The Times, 15th July, 1884.) A notice which specifies the breach, but does not require the lessee to remedy it, seems to be insufficient. (*North London Land Co.* v. *Jacques*, W. N. 1883, p. 187, 32 W. R. 283; *Jacques* v. *Harrison*, 12 Q. B. D. 136; *S. C. Ibid.* 165; *Greenfield* v. *Hanson*, 2 Times L. R. 876.) But a notice is not bad merely because it omits to require compensation. (*Lock* v. *Pearce*, 1893, 2 Ch. 271.) Nor because some of several breaches therein alleged cannot be established. (*Pannell* v. *City of London Brewery Co.*, 190, 1 Ch. 496.) Nor because it specifies the nature of the breaches without indicating what the lessee is required to do. (*Piggott* v. *Middlesex County Council*, 1909, 1 Ch. 134.) A notice which refers only to a breach which has been waived as a ground of forfeiture by acceptance of rent, and omits to refer to a breach which is continuing, is bad. (*Jacob* v. *Down*, 1900, 2 Ch. 156.)

The lessee should be made a party to the application when it is made by the mortgagees. (*North London Land Co.* v. *Jacques*, *supra*.) The lessee cannot apply for relief after the lessor has recovered possession in an action, provided that a proper notice was served upon the lessee. (*Rogers* v. *Rice*, 1892, 2 Ch. 170.) The same rule seems to apply where the lessor, without bringing an action, has been able to effect a lawful entry. (*Ibid.*)

It seems that the lessor in his notice could not include, in the required compensation, his solicitor's and surveyor's costs incurred by him in preparing and giving notice. (*Skinners' Co.* v. *Knight*, 1891, 2 Q. B. 542.) It is probable that this injustice was meant to be remedied by Conv. Act, 1892, s. 2, sub-s. (1), p. 202, *post*; but it seems that this enactment does not apply to a lessee who receives and complies with a notice, but only to a lessee who is forced to apply to the Court for relief. (See *Nind* v. *Nineteenth Cent. Bdg. Soc.*, 1894, 2 Q. B. 226.) If so, it is a question whether the later enactment is not superfluous. (See *Bridge* v. *Quick*, 61 L. J. Q. B. 375.)

An agreement for a lease was held not to be a lease within this sub-section, unless the lessee was entitled to specific

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performance. (*Swain* v. *Ayres*, 21 Q. B. D. 289; *Ayling* v. *Mercer*, W. N. 1885, p. 166; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220; *Strong* v. *Stringer*, W. N. 1889, p. 135.) Now, by Conv. Act, 1892, s. 5, p. 206, *post*, "lease" includes an agreement for a lease where the lessee has become entitled to have his lease granted, and "underlease" has a similar meaning.

A notice under this sub-section may run concurrently with a notice previously given merely to repair. (*Cove* v. *Smith*, 2 Times L. R. 778.)

A notice to repair must specify the necessary repairs. It is not enough to require repairs "in accordance with the covenants" in the lease. (*Fletcher* v. *Nokes*, 1897, 1 Ch. 271; *In re Serle, Gregory* v. *Serle*, 1898, 1 Ch. 652; *Matthews* v. *Usher*, 68 L. J. Q. B. 988; reversed on another point, 1900, 2 Q. B. 535.) And if a notice does not sufficiently specify the repairs, the fact that it sufficiently specifies other breaches of covenant which are complained of will not make the notice sufficient within the section. (*In re Serle, ubi supra;* but cf. *Pannell* v. *City of London Brewery Co.*, 1900, 1 Ch. 496; *Piggott* v. *The Middlesex County Council*, 1909, 1 Ch. 134.)

Upon the distinction between forfeiture of the lease and forfeiture of a privilege annexed thereto, see note on sub-s. (8), *infra*.

A notice addressed to the original lessee "and all others whom it doth or may concern," and served upon the occupier, is a sufficient notice to an assignee of the original lessee. (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348.) If more than one house is included in the same lease, it would seem that service upon the occupier of one only is sufficient; but it would be the safer course to serve the notice upon the occupiers of all. The notice must be served on the lessee personally; it is not enough to serve it upon a trustee to whom he has executed an assignment in favour of his creditors. (*Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.) As to the methods of serving notice, see s. 67, sub-s. (3), p. 167, *post*.

Where a breach of covenant is continuing, a claim for rent after the notice has expired does not render a fresh notice necessary. (*Penton* v. *Barnett*, 1898, 1 Q. B. 276, which apparently overrules a very obscurely reported case, *Bevan* v. *Barnett*, 13 Times L. R. 310, so far as the latter can be understood.)

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief, may grant it on such terms, if any, as to costs, expenses, damages,

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compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

See Conv. Act, 1892, ss. 4, 5, pp. 204, 206, *post.*

Applications for relief under this sub-section cannot be made by originating summons, but must be in an action commenced by writ. (*Lock* v. *Pearce*, 1893, 2 Ch. 271; *Warden, &c. of Highgate School* v. *Sewell*, 1893, 2 Q. B. 254.)

This section applies to breaches occurring before the commencement of the Act. (*Quilter* v. *Mapleson*, 9 Q. B. D. 672.)

As to the terms upon which relief may be granted, see *Bond* v. *Freke*, W. N. 1884, p. 47. In *Ebbets* v. *Booth*, The Times, 7th July, 1884, Stephen, J., refused to grant relief against a forfeiture, upon the ground that the breach committed by the lessee had placed the lessor in danger of a forfeiture to his superior landlord, who was not before the Court. This seems to be intrinsically reasonable; but the decision was reversed on appeal. (*Ibid.* 14th Feb., 1884.) In *Scott* v. *Brown*, W. N. 1884, p. 209, 51 L. T. 746, Kay, J., refused to grant relief under the discretion given by this sub-section. In *Mitchison* v. *Thompson*, 1 Cab. & Ell. 72, Lord Coleridge, C.J., appears to have granted relief to a lessee, though the demised premises were in a very dilapidated condition, and he claimed no relief in his pleadings.

Before the passing of Conv. Act, 1892, s. 4, p. 204, *post*, an underlessee could not have obtained relief. (*Burt* v. *Gray*, 1891, 2 Q. B. 98.) Such relief can now be given, but only by the peculiar kind of vesting order prescribed by the last-mentioned enactment. It does not appear that the lessor is bound to serve any preliminary notice upon underlessees. And underlessees cannot be charged by the lessor with his solicitor's and surveyor's costs. (*Nind* v. *Nineteenth Cent. Bdg. Soc.*, 1894, 2 Q. B. 226.)

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

The owner of the equity of redemption of leasehold property

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cannot re-enter under a proviso in the lease. (*Matthews* v. *Usher*, 1900, 2 Q. B. 535, reversing 68 L. J. Q. B. 988.)

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

For some remarks upon determinable limitations as distinguished from limitations liable to be determined by re-entry for breach of condition, see Challis, R. P. 2nd ed. 225, 226. A "lease limited to continue as long only as the lessee abstains from committing a breach of covenant," is *ipso facto* determined by a breach, without any entry by the lessor; and the Act throws no light upon the question, what is the estate of such a lessee who obtains relief, and where the estate comes from. The 4 Geo. 2, c. 28, s. 4, and the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 1, provide, in cases of relief against forfeiture for non-payment of rent, that the lessee shall hold the demised lands without any new lease. It might be well for a lessee, whose lease is of this description, in applying for relief under this sub-section, to ask for a declaration that he is entitled to have a new lease for the residue of the term. (See the form of the pleadings in *Hack* v. *Leonard*, 9 Mod. 91.)

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

As to covenants or conditions against assigning, &c., see now Conv. Act, 1892, s. 3, p. 203, *post*. An agreement for sale under which the purchaser is to be let into possession is not an

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assignment or underletting (*Horsey Estate* v. *Steiger*, 1899, 2 Q. B. 79), nor is a declaration of trust by the lessee in favour of a trustee for his creditors. (*Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.)

As to conditions for forfeiture on bankruptcy, &c., see now Conv. Act, 1892, s. 2, sub-s. (2), which provides that s. 14 (6) is to apply to a condition for forfeiture on bankruptcy of the lessee or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest shall be sold within such one year sub-s. (6) shall cease to be applicable thereto. Consequently a notice served by the landlord before the expiration of one year from the tenant's bankruptcy must comply with the requirements of s. 14 (1). (*Horsey Estate* v. *Steiger*, 1899, 2 Q. B. 79.)

A condition against the disposing of the land leased means a condition which on its face is against the disposing of the land leased, therefore it does not include a condition against the lessee executing an assignment for the benefit of his creditors, for such an assignment may or may not include a disposal of the land leased. Consequently a lessor who seeks to re-enter on the ground of such an assignment must—if the assignment does not include the leasehold—give notice under sub-s. (1). (*Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.)

Bankruptcy alone is not a breach of a covenant not to assign. (*Re Riggs*, 1901, 2 K. B. 16.)

A covenant or condition against assigning, &c., *without the lessor's consent*, seems clearly to be within the provision (i.). The addition, "such consent not being arbitrarily withheld," implies no contract by the lessor not to refuse his consent arbitrarily, but an arbitrary refusal leaves the lessee at liberty to assign without consent. (*Treloar* v. *Bigge*, L. R. 9 Exch. 151; *Sear* v. *House Property, &c. Society*, 16 Ch. D. 387.) There is no reason to suppose that, as was argued, but not decided, in *Pierson* v. *Harvey*, 1 Times L. R. 430, a covenant of this description is not within the above-mentioned provision; and the point seems now to be settled by *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417. The responsibility of deciding whether a refusal is arbitrary or not, is very onerous; and this qualification, if inserted in a lease, should therefore be put into the shape of a covenant by the lessor. Though the consent of the lessor cannot be unreasonably withheld, yet it must be applied for; and an assignment without any previous application will cause a forfeiture against which relief cannot be given. (*Barrow* v. *Isaacs*, *supra*; *Eastern Telegraph Co.* v. *Dent*, 1899, 1 Q. B. 835.) The earlier decision in *Hyde* v. *Warden*, 3 Ex. Div. 72, cannot be regarded as an authority that a tenant may assign or sub-let to a respectable person without first applying for the landlord's consent. It seems that, for the purpose of an action for specific performance, it will be sufficient if the vendor has procured the necessary licence in the interval between the contract and the completion of the purchase. (*Ellis* v. *Rogers*, 29 Ch. D. 661.)

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As to the meaning of "bankruptcy," see s. 2, sub-s. (xv.), p. 15, *ante*. Filing a bankruptcy petition under the Bankruptcy Act, 1883, was held, at any rate by virtue of s. 149 of that Act, if not *simpliciter*, to be within a condition against filing a "petition in liquidation" contained in a lease made before the coming into operation of the Conv. Act, 1881. (*Ex pte. Gould, Re Walker*, 13 Q. B. D. 454.) The bankruptcy of the original lessee after he has assigned over the term to another, will not cause a forfeiture. (*Smith* v. *Gronow*, 1891, 2 Q. B. 394.) In *Horsey Estate* v. *Steiger*, 1899, 2 Q. B. 79, it was held that a company in liquidation was bankrupt within the meaning of the section: and see *Ewart* v. *Fryer*, 1901, 1 Ch. 499; 1902, A. C. 187.

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

These enactments (Lord St. Leonards' Act, 1859, 22 & 23 Vict. c. 35, ss. 4—9; the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 2) contained the law, before the passing of the present Act, as to relief against forfeiture for neglect to insure against fire. By Lord St. Leonards' Act, ss. 4 and 6, a court of equity was empowered to relieve *once*, when no loss had happened and the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application in conformity with the covenant. By the C. L. P. Act, 1860, s. 2, this power was given to the courts of law.

The repealed s. 7 of Lord St. Leonards' Act gave to the person entitled to the benefit of a covenant, on the part of a lessee or mortgagor, to insure against fire, the benefit of any subsisting insurance not effected in conformity with the covenant. Sect. 8 protected a *bonâ fide* purchaser of leaseholds, if there was subsisting a proper insurance, and he had been furnished with the written receipt for the last payment of rent accrued due before the purchase. These provisions have not been re-enacted in express terms; but their object is in the main effected by 14 Geo. 3, c. 78, s. 83, which enables a lessor or mortgagee to require the insurance money to be laid out in reinstating the building, and by the present section.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

The Court of Chancery at an early period assumed jurisdiction to grant relief against forfeiture for non-payment of rent at an indefinite time after execution; but the usual practice was not to grant relief after six months had elapsed. This limit was made compulsory by 4 Geo. 2, c. 28, ss. 2—4; which provision is in effect re-enacted and superseded by the C. L. P. Act, 1852, 15 & 16 Vict. c. 76, s. 210. The above-mentioned

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sections of 4 Geo. 2, c. 28, were repealed by the Statute Law Revision Act, 1867.

By the C. L. P. Act, 1852, s. 211, it is provided that the lessee proceeding for relief in a court of equity shall not have or continue an injunction against proceedings in ejectment, unless, within forty days after a full answer made by the lessor, he brings into court the money due and costs.

By s. 212 of the same Act, it is provided that if a tenant at any time before trial in ejectment shall tender or pay into court the rent and arrears and costs, all further proceedings in the action shall cease. In such case no new lease is necessary.

By the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 1, it is provided that in ejectment relief may be given in a summary manner, upon rule or summons, up to and within the like time after execution, and subject to the same terms and conditions as to payment of rent, costs, and otherwise, as in the Court of Chancery.

It is not necessary that an action of ejectment, or its modern equivalent, an action to recover the land, should be brought in order that relief may now be given. (*Howard* v. *Fanshawe*, 1895, 2 Ch. 581.) The statute 4 Geo. 2 did not give any new relief; but, presupposing the existence of a right to relief in equity, restricted the time for obtaining it. (*Per* Lord Eldon, in *Wadman* v. *Calcraft*, 10 Ves. at p. 70.) Relief could therefore be given under that Act, when the lessor has entered without an action, under the original jurisdiction of the Court. The later statutes do not contain anything at variance with this. The result would be that, as the old right to relief, apart from the statutory restriction, was indefinite in point of time, the absence of an action would operate to enlarge the period within which relief might be obtained; but it is not probable that the Court, in the exercise of its discretion, would allow more than the statutory period.

In *Bowser* v. *Colby*, 1 Ha. 109, a lessee seeking relief in respect of a lease forfeited for non-payment of rent was not required to pay the money into court before the hearing, no *interim* injunction having been granted and the lessor being in possession.

The relief granted by the Court against forfeiture or penalty did not extend to permitting a privilege to be obtained by a party who had not performed the conditions on which it was granted; for example, a right of re-purchase (*Davis* v. *Thomas*, 1 Russ. & My. 506); or the renewal of a lease (*Bastin* v. *Bidwell*, 18 Ch. D. 238). And since the commencement of the present Act, in an Irish case, *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263, C. P. D., the Court refused to grant relief against forfeiture of a right of renewal, the renewal fees having been demanded and not paid within the prescribed time.

(9.) This section applies to leases made either before or after the commencement of this Act, and

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shall have effect notwithstanding any stipulation to the contrary.

The law laid down in *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622, has not been altered by this section; and in a lease prepared in accordance with a contract, providing for the insertion of "all usual and customary" clauses, the proviso for re-entry should be only for non-payment of rent, and should not extend to breach of covenant generally. (*Re Anderton and Milner*, 45 Ch. D. 476.)

IV.—Mortgages.

Sect. 15. Obligation on mortgagee to transfer instead of re-conveying.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Here "the terms" do not mean merely the payment of principal, interest, and costs; and a tenant for life, having the right to redeem a mortgage held by the remainderman, cannot require the latter simply to transfer the mortgage to a stranger; because the latter would not, as between himself and the remainderman, hold it upon the same terms as the tenant for life would, if it were re-conveyed. (*Alderson* v. *Elgey*, 26 Ch. D. 567.) Kay, J., has held (*Buck* v. *Campbell*, 1887, B. No. 3369, at Chambers, 5th March, 1889) that the section applies after judgment for foreclosure.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See Conv. Act, 1882, s. 12, and note thereon, p. 199, *post*.

Before the last-mentioned Act was passed, it had been decided that the phrase "mortgagor entitled to redeem," in the present section, includes a puisne mortgagee; and that, on a conflict of claims between the actual mortgagor and a puisne mortgagee, the latter would be entitled to exercise the right given by this section. (*Teevan* v. *Smith*, 20 Ch. D. 724.)

A mortgagor could not under this section require a transfer to be made where he could not, independently of the section, have

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required a re-conveyance. (*Teevan* v. *Smith*, *supra*.) Under the above-mentioned section of Conv. Act, 1882, a mortgagor can now require such transfer in spite of intermediate charges. But he cannot require the mortgagee to hand over the title-deeds where intermediate incumbrances exist. (*Corbett* v. *National Provident Institution*, 17 Times L. R. 5.)

The persons entitled to redeem are summarized in Fisher on Mortgages, 5th par. 1415 *et seq.*; Coote on Mortgages, ch. 83, s. 3; Seton on Decrees, Part IV. ch. 25, s. 1, 5th ed. pp. 1602—1604; 6th ed. pp. 1935—1937. It has been decided, in accordance with the opinion expressed by Lord Mansfield, in *Keech* v. *Hall*, 1 Dougl. 21, that a lessee holding under a lease granted by a mortgagor subsequently to the mortgage and not in exercise of a power, may redeem. (*Tarn* v. *Turner*, 39 Ch. D. 456.) A mortgagor who has parted with his equity of redemption acquires a new right to redeem, if he is sued by the mortgagee under his covenant to pay principal and interest. (*Kinnaird* v. *Trollope*, 39 Ch. D. 636.)

As to successive periods for redemption, see *Smithett* v. *Hesketh*, 44 Ch. D. 161.

The lien of a company on the shares of a member, to secure the member's debts due to the company, constitutes a charge within s. 2, sub-s. (vi.), of this Act, and such member, on paying off the lien, acquires the right to have the debt and lien transferred to his nominee. (*Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506.)

It is conceived that the exception in sub-s. (2) must be confined to the mortgagee himself who is or has been in possession, and that it does not extend to others who have not. Also that if a mortgagee is, or has been, in possession, this will not prevent him, if otherwise qualified, from exercising the right to require an assignment; because he exercises his right by standing in the shoes of the mortgagor by virtue of sub-s. (1), not in his proper capacity of mortgagee, which alone is referred to in sub-s. (2).

The objection against compelling a mortgagee in possession to transfer his charge sufficiently appears from the following passage:—"If a mortgagee in possession assigns over his mortgage, without assent of the mortgagor, the mortgagee is bound to answer the profits, both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to a person insolvent." (1 Eq. Ca. Abr. 328. See also *Nat. Bk. of Australasia* v. *United Hand-in-Hand, &c. Company*, 4 App. Cas. 391.) But this objection does not seem to apply where the mortgagor himself is the requesting party and there are no mesne incumbrancers. Nor does it seem to apply if the mortgagee is no longer in possession, unless he went out of possession in such a way as to leave himself still liable to account upon the footing of being in possession.

A distinction must be drawn between transferring a mortgage

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and concurring with the mortgagor in conveying the mortgaged property freed from the mortgage. The latter may not be done to the detriment of puisne incumbrancers, of whose charges the mortgagee has notice. (*West London Commercial Bank* v. *Reliance Bdg. Soc.*, 29 Ch. D. 954.)

Sect. 16. Power for mortgagor to inspect title-deeds.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

If the mortgage was executed before the commencement of the Act, this section will not apply to a subsidiary deed executed after its commencement. (*Burn* v. *Lond. & S. Wales Coal Co.*, W. N. 1890, p. 209.)

Sect. 17. Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

A borrower who has agreed to execute a legal mortgage cannot be compelled to insert therein a provision excluding the operation of this section. (*Farmer* v. *Pitt*, 1902, 1 Ch. 954.)

"Mortgagor" includes a puisne mortgagee. (*Hughes* v. *Britannia Bdg. Soc.*, 1906, 2 Ch. 607, 611.)

It is conceived that the words "seeking to redeem" will not be restricted to redemption actions, but will be held to apply

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also to foreclosure actions, where the objection against consolidation is more obvious than in redemption actions.

The whole cost of an action for foreclosure of two mortgaged properties cannot be charged upon both properties, unless the mortgages can be consolidated, but the costs must be separately apportioned between the properties. (*De Caux* v. *Skipper*, 31 Ch. D. 635; overruling *Clapham* v. *Andrews*, 27 Ch. D. 679.)

If one mortgage excludes the section, any number of other mortgages which do not exclude it may be consolidated therewith; and this right is not lost by giving notice to pay off one of them. (*Griffith* v. *Pound*, 45 Ch. D. 553. See also *Re Salmon*, 1903, 1 K. B. 147.)

As to what is sufficient to exclude the section, see *Hughes* v. *Britannia Bdg. Soc.*, *ubi sup.*

Consolidation (which differs widely from tacking, where several incumbrances over the *same* property are united in the hands of the person having the *legal estate*) consists in the right of an incumbrancer to refuse to be redeemed, except upon condition that the person seeking to redeem shall also fulfil some duty or claim other than the payment of the whole of the moneys secured by the incumbrance. The exercise of this right may be divided into two principal heads :—

(I.) Consolidation of one Incumbrance with others.

An incumbrancer may generally refuse to suffer one incumbrance to be redeemed, after default has been made at the appointed time for redemption (*Cummins* v. *Fletcher*, 14 Ch. D. 699), unless the person seeking to redeem is willing also to redeem every other incumbrance in his hands, as to which similar default has been made, created by the same mortgagor, or his representatives in title, over different property. But the assignee of an equity of redemption (including an incumbrancer) cannot be forced to redeem incumbrances created subsequently to the assignment. (*Jennings* v. *Jordan*, 6 App. Cas. 698; overruling, on this point, *Tassell* v. *Smith*, 2 De G. & J. 713.)

For the cases and distinctions, which are exceedingly numerous, see Fisher on Mortgages, 5th ed. par. 1210 *et seq.*; Coote on Mortgages, 4th ed. p. 830 *et seq.*; 1 Wh. & Tu. L. C. 5th ed. p. 674 *et seq.*; and *Hughes* v. *Britannia Bdg. Soc.*, 1906, 2 Ch. 607; *Sharp* v. *Rickards*, W. N. 1908, p. 234.

Note, that *Beevor* v. *Luck*, L. R. 4 Eq. 537, was much questioned by Lords Selborne and Blackburn in *Jennings* v. *Jordan*, and subsequently not followed by Fry, J., in *Harter* v. *Colman*, 19 Ch. D. 630. (See also *Minter* v. *Carr*, 1894, 3 Ch. 498.)

A mortgagor entitled to the ultimate residue of the sale moneys of a mortgaged property sold under the power of sale, does not seem to be a person "seeking to redeem" the mortgage. Therefore this section contains nothing to prevent the mortgagee from applying the balance of the sale moneys to make good the deficiency on another mortgage in his hands.

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(*Selby* v. *Pomfret*, 3 De G. F. & J. 595.) The trusts of the sale moneys contained in s. 21, sub-s. (3), p. 93, *post*, seem to give no greater right to the mortgagor in this respect than the usual trusts in a mortgage deed.

(II.) Consolidation of Incumbrance with Bond, or other Specialty, or Simple Contract, Debt.

As against the heir of a mortgagor, but not as against the mortgagor himself—(*per* Lord Hardwicke, *Morret* v. *Paske*, 2 Atk. at p. 53; *Archer* v. *Snatt*, 2 Stra. 1107; and the distinction is now clearly settled, though Lord Keeper Guildford, in *Baxter* v. *Manning*, 1 Vern. 244, once held the contrary)—an incumbrancer of real estate may refuse to be redeemed, except upon satisfaction of any bond or other specialty debt of the same mortgagor in his hands. (*Shuttleworth* v. *Laycock*, 1 Vern. 245; *Morret* v. *Paske*, 2 Atk. 52; *Anon.*, 2 Ves. sen. 662; *Coleman* v. *Winch*, 1 P. Wms. 775; *Elvy* v. *Norwood*, 5 De G. &. Sm. 240.)

The rule does not apply to the case of a devisee for the payment of debts. (*Heams* v. *Bance*, 3 Atk. 630.) But, since the Statute of Fraudulent Devises, it has applied to the case of a mere devisee. (*Challis* v. *Casborn*, Prec. Cha. 407.)

The case of *Margrave* v. *Le Hooke*, 2 Vern. 207, lies curiously upon the border between the two kinds of consolidation. A man separately mortgaged lands of which he was tenant in tail, and other lands of which he was tenant in fee simple. On his death, all the lands descended to the heir-at-law, who was also the heir in tail. The entail had never been barred, and the mortgage was not binding on the heir so far as regards the intailed lands. Thus the money purporting to be secured on the intailed lands became only a specialty debt secured by the covenant in the mortgage. It was held that the heir must redeem all the lands or none.

Formerly the bond or other specialty must have specified the heirs, in order to give this right to consolidate. But now see s. 59, p. 153, *post*.

As against the executor, in cases of mortgages of chattels, this rule has been applied to simple contract debts (*Spalding* v. *Thompson*, 26 Beav. 637); even though the estate represented by the executor was insolvent. (*Re Haselfoot*, L. R. 13 Eq. 327.) The liquidator of an insolvent company has been held to stand, in this respect, in a position similar to that of an executor. (*Re Gen. Prov. Assce. Co.*, L. R. 14 Eq. 507.) But these cases were disapproved of and not followed by Jessel, M.R., in *Talbot* v. *Frere*, 9 Ch. D. 568. (See also *Christison* v. *Bolam*, 36 Ch. D. 223.)

It seems that, since the 3 & 4 Will. 4, c. 104, simple contract debts may be consolidated as against the heir. (*Thomas* v. *T.*, 22 Beav. 341.)

The present section contains nothing to interfere with this kind of consolidation.

Leases.

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Leasing powers of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

It will be the safer course not to assume that the insertion of a new proviso for redemption, in a transfer of a mortgage originally made before the commencement of the Act, so far constitutes a new mortgage as to incorporate the statutory powers created by this Act. The introduction of such a proviso does not by itself constitute a new mortgage. The statutory powers may, if desired, be incorporated by express declaration on occasion of any transfer to which the mortgagor is a party. (See sub-s. (16), *infra*.) Though s. 19, *post*, contains no corresponding provision, its powers might, of course, be incorporated by reference.

Previously to this enactment, it is believed not to have been the common practice to insert powers of leasing into mortgages. Leases were usually left to be agreed upon between the parties. In the absence of such a power, and apart from the present section, there is no privity at law between the mortgagee and a lessee holding under a lease made by the mortgagor alone subsequently to the mortgage. The mortgagee could neither distrain upon nor sue such lessee in respect of rent due under the lease; though he might compel payment of it to him by threat of eviction. If threatened with eviction, the lessee had the right to redeem. (*Tarn* v. *Turner*, 39 Ch. D. 456.) Payment of rent under the threat of eviction discharged the lessee from the claim of the mortgagor thereto; but the lessee remained the mortgagor's tenant. It is clear that a statutory lease made subsequently to the mortgage by the mortgagor in possession will create the relation of landlord and tenant between the mortgagee, if he should take possession, and the lessee. (*Municipal, &c. Bdg. Soc.* v. *Smith*, 22 Q. B. D. 70.)

A lessee under a lease made by a mortgagor in possession by virtue of this section, can restrain the mortgagee, and those claiming under him, from obstructing the lessee's enjoyment of easements. (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 522.) But if a receiver has been appointed by the mortgagee, the mortgagor cannot distrain for rent, even after the receiver has refused to do so. (See *Woolston* v. *Ross*, 1900, 1 Ch. 788.)

Where the mortgagee joins with a mortgagor who is in possession in granting a lease, the tenant will be considered to hold under the better title, which by virtue of the section is that derived from the mortgagor in possession; consequently he cannot set up the permanent title of the mortgagee as overriding a restrictive covenant given by the mortgagor to a second

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mortgagee of which the tenant had notice. (*John Brothers Abergarw Brewery Co.* v. *Holmes*, 1900, 1 Ch. 188.)

The section does not enable the mortgagor to accept a surrender of a lease (*Robbins* v. *Whyte*, 1906, 1 K. B. 125), or to enter into an agreement to grant a lease. (*Dundas* v. *Vavasseur*, 39 Sol. Journ. 656.)

The lease may comprise furniture and sporting rights over part of mortgaged property which is not comprised in the lease. (*Brown* v. *Peto*, 1900, 2 Q. B. 653.)

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have by virtue of this Act, power to make from time to time any such lease as aforesaid.

To the statutory power of leasing given by sub-s. (2) to the mortgagee, there is, from the mortgagee's point of view, this objection, that, since it is given to any mortgagee in possession, a prior mortgagee might be compelled to incur the responsibilities of taking possession against his will, in order to prevent a subsequent mortgagee in possession from exercising the power. It is, therefore, probable that an attempt will be made by first mortgagees to prevent the operation of sub-s. (2) in favour of subsequent mortgagees. It is not certain (see note to sub-s. (13), *infra*) that a provision excluding the section, contained in a prior mortgage deed, will, in the absence of a similar provision in a subsequent mortgage deed, prevent the subsequent mortgagee from exercising the power; and in cases where much importance is attached to excluding the exercise of the power by subsequent mortgagees in possession, it may be desirable for the first mortgagee to insert in his deed a covenant by the mortgagor that he will not mortgage the equity of redemption without inserting such a provision into the subsequent mortgage deed.

An attornment clause contained in a mortgage deed makes the deed a bill of sale, within the meaning of the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, with reference to any personal chattels which might be distrained upon. (*Re Willis, Ex pte. Kennedy*, 21 Q. B. D. 384.) And being a bill of sale, it comes also within the purview of the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, as being given by way of security for the payment of money. Therefore, in order that the power of distress may become available, the deed needs to be registered as a bill of sale under the former Act; and the power, when available, is subject to the vexatious restrictions imposed by the latter Act. Attornment clauses seem now to be of at least doubtful utility, if not actually pernicious. It is at least possible, notwithstanding some expressions used in *Hall* v. *Comfort*, 18 Q. B. D. 11, which were disapproved of by the C. A. in *Re Willis*, *supra*, that so far as the power of distress is concerned,

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such clauses are absolutely void, whether the deed is registered or not: the deed not being in the form prescribed by the Bills of Sale Act, 1882; and such clauses may possibly entail upon a mortgagee, to the extent of the amount of the rent, the liabilities of a mortgagee in possession: see *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, at p. 353; *Ex pte. Punnett, Re Kitchin*, 16 Ch. D. 226, at p. 235; which are scarcely disposed of by the decision of Bacon, V.-C., in *Stanley* v. *Grundy*, 22 Ch. D. 478. The decision in *Hall* v. *Comfort*, *supra*, appears to be correct; but the judges do not appear to have distinguished clearly between an attornment, regarded as the foundation of the general relation between landlord and tenant, and the same thing regarded as a licence to seize chattels under a distress.

It was held in *Mumford* v. *Collier*, 25 Q. B. D. 279, that an attornment clause, though void as a bill of sale under the Acts, nevertheless creates the relation of landlord and tenant; and that the mortgagor may be treated as a tenant whose term has expired under R. S. C. 1883, Ord. III. r. 6. For this reason it has been suggested, Key & Elph. Conv. Prec. 5th ed. vol. 2, p. 51, that attornment clauses, though undoubtedly void as to any right of distress, should still be inserted, for the purpose of facilitating the mortgagee's remedies. But the learned authors remark that in *Davies* v. *Rees*, 17 Q. B. D. 408, it was held that a bill of sale, which is void under s. 9 of the Act of 1882, is void not only as to the charge, but also as to the covenant for payment; and they suggest that, in order to avoid the questions arising under this head, the attornment should be made by a separate instrument; which, they remark, is not necessarily under seal. But it may here be advisable to draw attention to a distinction. An attornment properly so called, is not necessarily under seal: see Shep. T. 261. But this means only the assent of the tenant to an assignment of the reversion; whereas the learned authors use the word in its other sense, of a contract to be, or be regarded as, a tenant; and as such contract seems to take effect by estoppel, it is a question whether sealing may not be essential.

If the heir-at-law of the mortgagor comes in by descent, an attornment clause in his ancestor's mortgage deed will not make him tenant to the mortgagee, although he continues to pay interest. (*Scobie* v. *Collins*, 1895, 1 Q. B. 375.)

An attornment clause, though it be void as a bill of sale, will not otherwise prejudice the mortgage. (*Re Burdett, Ex pte. Byrne*, 20 Q. B. D. 310.)

As to the effect of this section upon incumbrances created before the commencement of the Act, see note on sub-s. (16), *infra*.

As to leases granted under this section by a tenant for life of the equity of redemption, see note on S. L. Act, 1882, s. 6, p. 230, *post*.

As to leases granted under the last-mentioned Act, when the tenant for life has incumbered his interest, see s. 50 of that Act, p. 313, *post*.

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(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

Sporting rights may be the subject of an occupation lease. (*Brown* v. *Peto*, 1900, 2 Q. B. 653.)

When a tenant for life mortgages his life interest, the mortgagee on going into possession will acquire power under this section to grant leases for twenty-one or ninety-nine years, but only subject to the qualification, *if the mortgagor shall so long live*. As to the question, whether a lease so made would be valid against a lessee claiming under a subsequent lease made by the same tenant for life in exercise of his statutory powers, see note on s. 50 of S. L. Act, 1882, p. 313, *post*.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

As to the meaning of "best rent," see Woodfall, Landl. and Ten. 12th ed. pp. 359, 360; Sugden on Powers, cap. 10, sect. 4; Chance on Powers, 2285 *et seq.*; Farwell on Powers, cap. 17, sect. 17, 2nd ed. p. 614. (See also note on S. L. Act, 1882, s. 7, sub-s. (2), p. 232, *post*.)

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

Where the mortgage comprises an undivided share of land (see s. 2, sub-s. (ii.), p. 10. *ante*) the mortgagor, in order to comply

with this provision, must either stipulate with his co-lessors for delivery to him of the counterpart, or else with the lessee for the execution of a duplicate counterpart.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

The words, "within not more than five years from the date of the lease," and "within that time," appear to refer only to agreements to build in the future, and not to works completed in the past. But it is probable that the words, "having erected," may be taken to mean, "having erected under the contract for the lease." Compare the similar provision in S. L. Act, 1882, s. 8, sub-s. (1), p. 233, *post*, in which no limit of time is assigned.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

The effect of failure to deliver a counterpart is not to invalidate the lease, but by virtue of s. 20, sub-s. (iii.), p. 90, *post*, to cause the power of sale to become immediately exerciseable.

Delivery of a counterpart cannot be an acknowledgment of a mortgagee's right within the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57; if for no other reason, because the counterpart would not be a writing signed by the mortgagor.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

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This sub-section cannot be confined to parties to the contract, because the contract could be enforced as between them without it. This consideration suggests the following questions:—

1. Can an intending lessee enforce a mortgagor's contract against a mortgagee who has taken possession after the contract?
2. Can a mortgagee, who has meanwhile taken possession, enforce his mortgagor's contract against the intending lessee?
3. Can a mortgagee, out of possession, enforce the contract of his mortgagor in possession, even against the will of the mortgagor?
4. Can a mortgagor, out of possession, enforce the contract of his mortgagee in possession even against the will of the mortgagee?

There seems to be nothing in the language of this sub-section to exclude any of these cases. As the mortgagee and mortgagor can only grant leases while themselves actually in possession, a change in possession would apparently effect a change in the person liable to grant the lease, and A. may be compelled by B. specifically to perform a contract made between C. and B., although he is not C.'s representative in title.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

The words "by the mortgagor and mortgagee" seem to be superfluous unless the mortgagor and mortgagee must both execute the mortgage deed or other writing so as to express a contrary intention. The case is not analogous to that of a person accepting and acting upon a deed, because the person to take advantage of a failure to exclude the power of leasing would be the lessee, and not either of the parties to the deed or other writing.

And it is to be remarked that in the case of *Witham* v. *Vane*, the Court of Appeal held that, "it is impossible to say that a covenant not executed is the same as a covenant executed, because the person who ought to have executed it, or who was intended to have executed it, takes the estate." The judgment of the Court of Appeal was afterwards reversed by the House of Lords, but upon the ground that there was sufficient evidence of the execution of the covenant, not upon the ground that it would have been binding though not executed. This case is reported in Dom. Proc., Challis, R. P. 1st ed. 342, 2nd ed. 401.

A trustee is not guilty of negligence because he takes a mortgage without insisting on the insertion of a clause excluding the operation of s. 18 (*Shaw* v. *Cates*, 1909, 1 Ch. p. 408).

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

There seems to be nothing to prevent the insertion of a power to grant leases at a fine where the mortgagor was originally seised in fee simple in possession free from incumbrances. It will be necessary for the first mortgagee either to secure the absence of any such power in subsequent mortgages, or to take care that the subsequent mortgagees are not allowed to enter into possession. And, indeed, it seems to be desirable, in the interests of the first mortgagee, that subsequent mortgagees shall be precluded altogether from exercising the power of leasing. (See note on sub-s. (2), *supra*.)

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

This section therefore contains nothing to authorize a lease of copyholds (without licence) in manors where there is no custom to lease without licence.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or

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interest of any mortgagee not joining in or adopting the agreement.

The sub-section seems designed to leave a mortgagee whose rights accrued before the commencement of the Act, in the same position as if the Act had not been passed.

It was held by North, J., that in a mortgage made after the Act, in pursuance of a contract entered into before the Act, and stipulating that the mortgage should "contain all usual clauses," the mortgagee could not insist upon the exclusion of sub-s. (1), *supra*. (*Re Nugent and Riley*, W. N. 1883, p. 147; 49 L. T. 132.) This decision seems gratuitously to attribute a variable intention to the contracting parties.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

The power of the mortgagor in possession, which this sub-section seems to recognize, of making parol leases for three years, is not such a power as a mortgagee would always approve, and under some circumstances it ought to be excluded.

The words, "so far as circumstances admit," appear to exclude the necessity for a proviso for re-entry, and other inconsistent restrictions, from parol demises. (See *Reveley* v. *Thomas*, 32 Sol. Journ. 468, where, however, the point was not actually decided.)

Sale; Insurance; Receiver; Timber.

Sect. 19. Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

The powers contained in this section are in substitution for, and are an enlargement of, the corresponding powers contained in Part II. of Lord Cranworth's Act, 23 & 24 Vict. c. 145; which is repealed by s. 71, p. 172, *post*.

The principal changes which have been made are—

(1.) The present Act extends to all property, instead of being confined to "hereditaments of any tenure or any interest therein."

(2.) The time for the exercise of the powers after default is much shortened.

(3.) The power to insure arises immediately after execution of the mortgage deed, instead of being exerciseable under the

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same circumstances as the power of sale, and the amount of the insurance is now for the first time expressly limited. (See s. 23, sub-s. (1), p. 96, *post*.) The application of the insurance money, if received by the mortgagor, is for the first time defined. (Sect. 23, sub-s. (3), p. 97, *post*.) If received by the mortgagee, the old rules are still in force.

(4.) The power to appoint a receiver is now exerciseable when the power of sale has arisen (s. 24, sub-s. (1), p. 99, *post*), instead of being exerciseable a year after the time appointed for payment of principal, or on default for six months in payment of interest, or on neglect to insure.

(5.) No restriction is now placed on the mortgagee's choice of a receiver. (Compare s. 17 of Lord Cranworth's Act.)

(6.) The power to cut timber is novel.

(7.) The power given by s. 15 of Lord Cranworth's Act to the mortgagee, to convey mortgaged property "for all the estate and interest therein which the mortgagor had power to dispose of," is omitted. (See note on s. 21, sub-s. (1), at p. 91, *post*.)

If the mortgage is to several persons, the powers will enure by survivorship; if to a single mortgagee, to his personal representatives. Since not only the mortgage debt, but also the legal estate (see s. 30, p. 109, *post*), even though of inheritance, devolves on the personal representatives, these are the only persons deriving title under the original mortgagee. See s. 2, sub-s. (vi.), p. 13, *ante*.

It appears that a memorandum of deposit under seal, by which property is expressed to be charged, though it is not strictly a deed, will suffice to confer upon the equitable mortgagee the powers given by this section. This seems to have been assumed in *Re Hodson and Howe*, 35 Ch. D. 668, and is laid down by Kay, J., in *Blaker* v. *Herts, &c. Waterworks Co.*, 41 Ch. D. at p. 406. But the right to exercise the power of sale does not necessarily imply power to convey the legal estate, if any. An equitable mortgagee cannot convey the legal estate. (*Re Hodson and Howe*, 35 Ch. D. 668.)

Debentures of a joint stock company creating a floating charge upon the company's undertaking and property, though under seal, do not confer these statutory powers upon the debenture holders. (*Blaker* v. *Herts, &c. Waterworks Co.*, 41 Ch. D. 399; see in particular pp. 405, 406.) The debentures may of course contain express powers. See note on sub-s. (iii.), *infra*. And, of course, the trustee of a "covering deed," which is not a floating charge but an express mortgage, has the same rights as any other mortgagee; though, if the company is ordered to be wound up under the supervision of the Court, the leave of the Court is required for the prosecution of any proceedings. (Comp. Act, 1862, s. 87.) But the Court will not generally interfere with the exercise of lawful powers. (*Re Lloyd & Co.*, 6 Ch. D. 339; *Re Longdendale & Co.*, 8 Ch. D. 150; *Re Brown & Co.*, 18 Ch. 649.)

The holders of debentures issued by a tramway company,

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which is subject to the Tramways Act, 1870, cannot obtain an order for sale, but only for the appointment of a receiver. (*Marshall* v. *South Staff. Rway. Co.*, 1895, 2 Ch. 36.) And it would seem that an express power of sale purporting to be conferred by the debentures would be void. It makes no difference whether the company is incorporated under the Companies Acts or under a special Act.

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; and

Apart from statutory powers, a mortgage of land implies no power of sale; and an express power is restricted to the persons named in that behalf. (*Re Rumney and Smith*, 1897, 2 Ch. 351.) But in a mortgage of shares in a company or in a pledge of personal chattels a power of sale is implied. (*Deverges* v. *Sandeman, Clark & Co.*, 1902, 1 Ch. 579.)

As to mortgages, the money secured by which is repayable by instalments, see note on s. 20, sub-s. (i.), p. 90, *post*.

It has been held that this power is not implied in a bill of sale subject to the provisions of the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, because such implication would be superfluous. (*Re Morritt*, 18 Q. B. D. 222; *Watkins* v. *Evans*, *ibid.* 386; *Calvert* v. *Thomas*, 19 Q. B. D. 204.) It is difficult to reconcile these decisions with the express language of s. 2, subsects. (i.) and (vi.), pp. 10 and 13, *ante*; and the point appears to have caused a considerable amount of dissension among the judges.

The power conferred by this clause will not enable a mortgagee to sell fixtures apart from the mortgaged lands. (*Batcheldor* v. *Yates*, 38 Ch. D. 112.)

If a mortgagee wishes to sell land or minerals separately, he can obtain power from the Court to do so under T. A. 1893, s. 44, *post*, p. 425.

A mortgagee may sell part of the mortgaged land with an implied right to light over the rest of the land. (*Born* v. *Turner*, 1900, 2 Ch. 211.)

A mortgagee cannot after the usual order *nisi* for foreclosure

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and before the foreclosure is made absolute exercise his power of sale without the leave of the Court. But the power is suspended only, not extinguished; and a *bonâ fide* purchaser without notice may get a good title under the power. (*Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857.)

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

These premiums are only a charge upon the property, and cannot be recovered from the mortgagor as a debt. A mortgage deed, therefore, should still contain the ordinary covenant for their repayment.

Before Lord Cranworth's Act, a prior mortgagee could not, as against subsequent mortgagees, add premiums paid by him to his security, unless the mortgage deed gave him express power in that behalf. (*Brook* v. *Stone*, 13 W. R. 401.) If the mortgage deed contained a covenant to insure on the part of the mortgagor, but gave no power to the mortgagee, the premiums might be charged against the mortgagor, but not against subsequent mortgagees. But premiums were sometimes allowed to a mortgagee in possession, as "just allowances," in taking the accounts against him.

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

Although a mortgagee can appoint a receiver under this section, the Court will not refuse to appoint one when an action is pending. (*Tillett* v. *Nixon*, 25 Ch. D. 238.) But after order for foreclosure absolute, the Court will not appoint a receiver, even though the conveyance remains to be settled by the judge. (*Wills* v. *Luff*, 38 Ch. D. 197.) Since the Judicature Act, 1873, s. 25, sub-s. (8), a receiver may be appointed by the Court at the instance of a legal mortgagee; but he cannot demand it as of right; and if he has taken possession the Court will not be disposed, by appointing a receiver, to enable him to go out of

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possession without the assent of the persons interested in the equity of redemption. (*Re Prytherch, P.* v. *Williams*, 42 Ch. D. 590.) The Court, however, will, under such circumstances, appoint a receiver, if that course seems to be to the advantage of all parties. (*Gloucester Bk.* v. *Rudry, &c. Colliery Co.*, 1895, 1 Ch. 629; see p. 635.) As to the position, in this respect, of a mortgagee in possession, see *Nat. Bk. of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391.

But if the mortgagee can appoint a receiver without the aid of the Court, it would seem that he might by so doing escape from the position of mortgagee in possession without the consent of the mortgagor; and would account as mortgagee in possession only up to the date of the appointment. (See *Tillett* v. *Nixon*, 25 Ch. D. 238; *Mason* v. *Westoby*, 32 Ch. D. 206.) In *Gloucester Bk.* v. *Rudry, &c. Colliery Co., supra*, it seems to have been tacitly assumed, that a mortgagee in possession who appoints a receiver under this section does not thereby escape from being in possession, though the subsequent appointment of a receiver by the Court would relieve him.

If debentures contain an express power to appoint a receiver, the holders may appoint a receiver, even of the whole property and assets of the company; and if the company is wound up the Court will not interfere with the powers of the receiver, notwithstanding the appointment of an official liquidator. (*Re Pound & Co.*, 42 Ch. D. 402.)

In an Irish case, where the life estate and the fee in remainder were both incumbered, the mortgagee of the life estate appointed a receiver; and subsequently an absolute order for sale was made, and the Court appointed a receiver on the application of the same mortgagee; it was held that in taking accounts between the mortgagee who had appointed the receiver and the other incumbrancers, it was sufficient for him to verify by affidavit the amounts received by him from his receiver, and that the accounts could be taken without evidence as to what the latter had received. (*Re Della Rocella's Estate*, 29 L. R. Ir. 464.)

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

It may in many cases be desirable for the mortgagor to exclude the power of cutting timber, if he can.

As to cutting timber by a mortgagor in possession, see *Farrant* v. *Lovel*, 3 Atk. 723; *Humphreys* v. *Harrison*, 1 Jac. & W. 581;

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King v. *Smith*, 2 Ha. 239; *Hampton* v. *Hodges*, 8 Ves. 105; *Hippesley* v. *Spencer*, 5 Madd. 422. The principle appears to be, that a mortgagor in possession may fell timber, if the security is ample, and the onus of proof that it is insufficient will lie upon the mortgagee seeking to restrain him.

As to cutting timber by a mortgagee in possession under a mortgage prior to this Act, see *Withrington* v. *Banks*, Sel. Ch. Ca. 30, where it was laid down, that a mortgagee in possession will not be allowed to fell timber, unless the security is shown to be defective. The same principle applies to the opening of mines. (See *Millett* v. *Davey*, 31 Beav. 470.)

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

It is not at all clear that an express power contained in the mortgage deed, without any reference to the Act, would come within this sub-section, so as to "operate in like manner," &c. Express powers should therefore either be absolutely complete within themselves, or they should be declared to be "provisions of the Act . . . varied or extended by the mortgage deed."

It is conceived that the insertion of an express power will not of itself amount to the expression of a "contrary intention" within the meaning of the next following sub-section.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

Sect. 20. Regulation of exercise of power of sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has

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been made in payment of the mortgage money, or of part thereof, for three months after such service; or

As to regulations made by the Act respecting notice, see s. 67, p. 167, *post*.

The notice required to be given by this section may be waived by the persons entitled to receive it. (*Re Thompson and Holt*, 44 Ch. D. 492.)

Where the mortgage debt is due, and notice has been given to the mortgagor to pay the same at the expiration of three calendar months from the date of the notice, the mortgagee may sell as soon as the three months have expired if the money be not paid. (*Barker* v. *Illingworth*, 1908, 2 Ch. 20.)

Notice to one of several tenants in common or joint tenants will suffice as to the whole. It is not clear that the words, "or one of several mortgagors," are applicable to any other cases; and the more prudent course, both with regard to several mortgagors having different interests in the property, as a tenant for life and remainderman, and also with regard to puisne incumbrancers, who are included under the word "mortgagor" by s. 2, sub-s. (vi.), p. 13, *ante*, will be to give notice to all of them. (See *Hoole* v. *Smith*, 17 Ch. D. 434.) On the other hand, though the word "mortgagor" may include a puisne incumbrancer, yet the words, "*the* mortgagor" are very ill adapted to indicate a class composed of all the puisne incumbrancers together with the mortgagor properly so called; and the most natural construction would import, that the notice needs to be given only to the mortgagor properly so called; and that, if the mortgagor properly so called is made up of several joint tenants or tenants in common, notice to one of them will suffice.

Where the mortgage money is repayable by instalments, the deed should provide that the statutory power shall become exerciseable within a specified time after the non-payment of any instalment, unless the deed contains a provision, that on default in payment of any instalment the whole of the remaining money shall become due. See s. 19, sub-s. (2).

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

If the mortgage money is repayable by instalments, the power of sale becomes exerciseable on an instalment falling into arrear, if it appears from the deed that the instalment includes interest. (*Walsh* v. *Derrick*, 19 Times L. R. 209.)

(iii.) There has been a breach of some provision contained in the mortgage deed or in this

Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

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It is clear that, on a mortgage of leaseholds by assignment, in which the mortgagor assigns "as beneficial owner," non-payment of the rent reserved by the lease would be a breach of "a provision contained in the Act, and on the part of the mortgagor"; and it is conceived that the same doctrine will be held to apply also to mortgages by demise, though the language of s. 7, sub-s. (1), (D), p. 44, *ante*, is not well adapted to include the latter.

The operation of this section may for practical purposes be varied, without sacrificing the statutory power of sale, by a declaration embodying the agreed terms of variation. (See s. 19, sub-s. (2), p. 89, *ante*.)

The section does not affect the power of sale which is implied in the case of the mortgage of shares in a company not made by deed. (*Deverges* v. *Sandeman, Clark & Co.*, 1902, 1 Ch. 579.)

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

Sect. 21. Conveyance, receipt, &c. on sale.

An equitable mortgagee cannot convey the legal estate. (*Re Hodson and Howe*, 35 Ch. D. 668.)

This sub-section does not preserve the remarkable provision in s. 15 of Lord Cranworth's Act, which purported to enable a mortgagee to vest in a purchaser the property sold (not being copyhold) for all the estate and interest therein which *the person who created the charge* had power to dispose of. That provision was probably designed to dispense with the need for getting in outstanding legal estates, and the "last days" of the term when leaseholds were mortgaged by way of demise, as to which see *Hiatt* v. *Hillman*, 19 W. R. 694, cited 35 Ch. D. 669; but its language was not restricted to such cases, and for aught that appeared on its face, a mortgagee entitled only to a

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term of years might have sold the reversion in fee simple if vested in the mortgagor, even though that reversion were not the immediate reversion upon the mortgagee's term, but separated from it by an intervening particular estate. North, J., has held that under it an equitable mortgagee might convey the legal estate. (*Re Solomon and Meagher*, 40 Ch. D. 508.) Mortgages of leaseholds by demise usually provide, that after a sale the mortgagor shall hold the superior term in trust for the purchaser. This provision has in many cases been of less importance since the passing of Conv. Act, 1892, s. 2, p. 202, *post*.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

If the purchaser has notice of an irregularity which is such that it cannot have been waived by the mortgagor, he cannot safely purchase from the mortgagee, without requiring proof that all the persons interested have waived the irregularity. (*Selwyn* v. *Garfit*, 38 Ch. D. 273.) That case is a decision upon an express clause contained in a mortgage; but it is conceived that the same principle is applicable to this sub-section, although its language is somewhat stronger. Cotton, L.J., seems to have thought, that notice of an irregularity throws upon the purchaser the duty of making inquiries which he otherwise might safely have omitted; while Bowen, L.J., seems to have thought that a waiver might perhaps, without inquiry, be presumed as against the mortgagor, but not as against subsequent incumbrancers. See also note on s. 22, sub-s. (2), p. 96, *post*.

But a purchaser who has no actual notice of irregularity or impropriety, though he has seen a valuation tending to show that the sale to his vendor, in professed exercise of the power of sale, was at an undervalue, and also makes no inquiry into the circumstances of such sale, is not thereby affected with notice that the power of sale was improperly exercised, and may rely on this sub-section. (*Bailey* v. *Barnes*, 1894, 1 Ch. 25.) That case is also an important decision upon the protection afforded by the legal estate, if got in *pendente lite*.

The protection afforded by sub-s. (2) is only available after the conveyance has been obtained; it does not preclude a purchaser from inquiring whether the mortgagee is in a position to exercise the power of sale, nor from proving *aliunde* that the

power is being improperly exercised. (*Life Interest, &c. Corpn.* v. *Hand in Hand, &c. Society*, 1898, 2 Ch. 230.) C. A. 1881, Sect. 21.

The "remedy in damages" may be obtained by common law action in the County Court under the County Courts Act, 1888, s. 56, if the amount claimed does not exceed what is within the jurisdiction. (*Ames* v. *Higdon*, 69 L. T. 292.)

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

The question, whether the relation of trustee and *cestui que trust* is established between mortgagee and mortgagor, is important. Previously to the Trustee Act, 1888, s. 8, p. 369, *post*, no claim of a *cestui que trust* against his trustee for any property held on an *express* trust, was liable to be barred by the Statutes of Limitation. (See 3 & 4 Will. 4, c. 27, s. 25, and Jud. Act, 1873, s. 25, sub-s. (2).) By the Act of 1888 relief is given to trustees who have not been privy to any fraud, and who do not retain, and have not converted to their own use, the property sought to be recovered; but time does not begin to run against any beneficiary until his interest has become an interest in possession.

From *Locking* v. *Parker*, L. R. 8 Ch. 30, at p 40, it appears that, if words amounting to an expression of trust occur in the mortgage deed, the mortgagee will be an express trustee of the surplus sale moneys. (See also *Lake* v. *Bell*, 34 Ch. D. 462.) Therefore the words *in trust*, occurring in this subsection, seem to make the mortgagee so far an express trustee. He would be an *implied* trustee on any exercise of a power of sale, without the occurrence of words expressing a trust. (*Matthison* v. *Clarke*, 3 Drew. 3.) In *Kirkwood* v. *Thompson*, 2 H. & M. 392 (affd. 2 De G. J. & S. 613), Wood, V.-C., said that he saw no difference between the case of an ordinary mortgage and that of a trust for sale; and the Court of Appeal, in *Locking* v. *Parker*, L. R. 8 Ch. 30, took a similar view. But those cases did not decide that a trust can be express without

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being expressed. "The words 'express trust' in the statute [3 & 4 Will. 4, c. 27, s. 25] are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law." (Ld. Westbury in *Dickenson* v. *Teasdale*, 1 De G. J. & S. at p. 59.) As to the phrase in the Jud. Act, see *Banner* v. *Berridge*, 18 Ch. D. 254, at pp. 262—265; and see p. 269.

In *Banner* v. *Berridge*, *ubi supra*, at p. 260, Kay, J., drew a distinction between an ordinary power of sale contained in a mortgage and a statutory power, such as that conferred by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which merely gives a power to sell without saying anything about the destination of the purchase-money.

In general, it may be said that a mortgagee is to some extent a trustee, though not an express trustee, for the mortgagor and persons claiming under him, in respect to the following matters:—

1. If he is in possession, he is a trustee in respect of the surplus rents and profits. (*Matthison* v. *Clarke*, *supra*.)

2. If he exercises a power of sale he is a trustee, or in the nature of a trustee, of the surplus sale moneys, to the extent above indicated.

With respect to any policy moneys received by the mortgagee under a policy of assurance against fire, in excess of the amount due under the mortgage, it does not appear that any such relation exists. (See *Dobson* v. *Land*, 8 Ha. 216, at p. 220.) If a policy of insurance on the life of the mortgagor is effected, the law seems to be that, unless the proceeds are excluded from the mortgage altogether, and must in any event belong to the mortgagee, the surplus will in any event belong to the mortgagor, notwithstanding any contract contained in the mortgage that under particular circumstances they shall belong to the mortgagee. (*Salt* v. *Marq. of Northampton*, 1892, A. C. 1.) But there is no reason to suppose that the mortgagee is an express trustee in relation thereto.

3. After repayment of the mortgage money, but before re-conveyance. Since the trust is not express, the mortgagor can obtain a possessory title, and the legal estate of the mortgagee out of possession can be extinguished by the operation of the Statute of Limitations. (*Sands to Thompson*, 22 Ch. D. 614.)

Generally, upon the duties of a mortgagee in exercising his power of sale, and his relation to the mortgagor, see *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762; 1897, A. C. 180.

If the persons entitled cannot be ascertained, it is the duty of the mortgagee forthwith to invest the surplus, or to pay it into Court. (*Charles* v. *Jones*, 35 Ch. D. 544.)

Of course a puisne mortgagee cannot sell the mortgaged property free from prior incumbrances, unless he either obtains the consent of the persons entitled thereto, or pays into Court the sums necessary to obtain an order discharging them, under s. 5, p. 26, *ante*.

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(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

Sub-s. (4) refers to the executors, administrators, and assigns of the mortgagee, and does not extend to a person entitled to give a discharge as agent. (*Re Dowson and Jenkins*, 1904, 2 Ch. 219.)

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

It has sometimes been maintained in argument, but never decided, that an express power of sale is inconsistent with a right to foreclose. (See *Slade* v. *Rigg*, 3 Ha. at p. 36.)

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Sect. 22. Mortgagee's receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

But if the subject of the mortgage is a share in a trust estate, the trustees are not bound to pay over the whole share to the mortgagee, but only to pay so much as is due under the mortgage. (*Re Bell, Jeffery* v. *Sayles*, 1896, 1 Ch. 1; *Hockey* v. *Western*, 1898, 1 Ch. 350.)

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(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

The power to give a receipt for "securities" is new, and will enable the mortgagee to give receipts for choses in action on which he has a charge.

If a mortgage debt and an estate of inheritance or *pur autre vie*, mortgaged to secure the same, are specially bequeathed and devised, the devise of the estate will not take effect (see s. 30, p. 109, *post*), but it will pass to the testator's legal personal representative. But, the debt being a proper subject of bequest, the legatee may perhaps be held to be the person "deriving title under the original mortgagee" (see s. 2, sub-s. (vi.), p. 13, *ante*), and, as such, to be the proper person to give the receipt. Until, however, the point is decided, it will be well for the mortgagor, discharging the debt and seeking a re-conveyance, to require the receipt to be given both by the legatee and by the executor, unless the latter has previously conveyed the estate to the former, or has authorized the legatee to receive the money.

As to a mortgagee's power to make a title after the debt is alleged to have been satisfied, see *Dicker* v. *Angerstein*, 3 Ch. D. 600. In that case stress was laid upon the wording of the deed. The second clause of sub-s. (1), *supra*, seems sufficient to protect a *bonâ fide* purchaser. It is conceived, however, that a mortgagor who has discharged his debt could interfere to prevent a sale, and that a purchaser taking with actual notice that nothing is due under the mortgage would not be protected. In a case where a purchaser had actual notice, before the contract for sale, that the principal and interest had been tendered, the sale (made under an express power contained in the deed) was set aside. (*Jenkins* v. *Jones*, 2 Giff. 99.) See also note on s. 21, sub-s. (2), p. 92, *ante*.

Sect. 23. Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two-third parts of the amount that

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would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

It is conceived that the onus of proving that the insurance is kept up would be thrown upon the mortgagor, and that he would therefore be bound to produce the receipts for premiums.

It seems to follow that if, on making inquiry, the mortgagee obtains no sufficient evidence that a proper insurance has been effected and is kept on foot, he may himself insure under this sub-section; and his rights will not be affected by the fact, if it should so turn out, that the mortgagor has kept on foot an insurance without his knowledge. But it does not appear that the mortgagor is bound to volunteer notice of the insurance, or of the payment of the premiums; and since, in relation to a prior mortgagee, the word "mortgagor," by virtue of s. 2, sub-s. (vi.), p. 13, *ante*, includes a puisne mortgagee (*Teevan* v. *Smith*, 20 Ch. D. 724), a mortgagee will do well before insuring to make inquiry of all subsequent mortgagees of whose charges he has received notice.

Mortgage deeds should still contain a covenant to insure to the requisite amount, and to produce the policy and receipts on demand; which, in the case of a mortgage for a term certain, should provide that the policy moneys shall be immediately applicable in discharge of all moneys secured by the mortgage, whether "due" within the meaning of sub-s. (4), *infra*, or not. See also, as to the form of such covenants, note on sect. 19, sub-s. (1) (ii.), p. 87, *ante*.

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

It is only under the Act, or by virtue of special contract, that

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a mortgagee of any property not included in the description of "houses or other buildings" (as to which see 14 Geo. 3, c. 78, s. 83, cited in note on sub-s. (4), *infra*) can require the policy moneys to be applied in making good the damage. Even a covenant to insure contained in the mortgage deed was not enough, previously to this sub-section, in the absence of a stipulation that the policy moneys should be so applied. (*Lees* v. *Whiteley*, L. R. 2 Eq. 143; which was approved by a majority of the Court of Appeal in *Rayner* v. *Preston*, 18 Ch. D. 1.) Where the mortgage deed contained no covenant to insure, the mortgagee could not require the money paid under any policy effected by the mortgagor to be so applied.

In *Poole* v. *Adams*, 12 W. R. 683, it was held that a purchaser of buildings was not entitled to the benefit of an existing insurance, in the absence of any stipulation in his contract; and the principle seems equally applicable to the case of a mortgagee.

It is true that in *Garden* v. *Ingram*, 23 L. J. Ch. 478, a mortgagee was held entitled to the benefit of a policy existing at the date of the mortgage deed; but that decision was based on the ground, that the property was held under a lease which contained an express provision that the policy moneys should be laid out in reinstating the premises. (See *Lees* v. *Whiteley* and *Rayner* v. *Preston*, *supra*.) But it is to be remarked that, if a vendor should receive the policy moneys, they can be recovered back from him by the office, unless he makes a corresponding allowance out of the purchase-money to the purchaser. (*Castellain* v. *Preston*, 11 Q. B. D. 380.)

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

When the mortgage money is not to be called in for a term certain, it does not seem to be "due" until the expiration of the term. Therefore, under such circumstances this sub-section would not, in the absence of special stipulation, enable the mortgagee to claim the policy moneys.

It is probable that the phrase "on an insurance," will be held to be equivalent to the phrase, "on an insurance effected under the mortgage deed or under this Act," as in sub-s. (3), *supra*.

By 14 Geo. 3, c. 78, s. 83, the insurance office is authorized and required, upon the request of any person interested in any houses or other buildings burnt down or damaged by fire, or upon any grounds of suspicion, to cause the insurance money to be laid out towards reinstating the property, unless the parties claiming the money give sufficient security so to lay it out, or unless the money be disposed among all the contending parties to the satisfaction of the office. This provision is preserved by 7 & 8 Vict. c. 84, sched. (A.); 18 & 19 Vict. c. 122, s. 109; 28 & 29

Vict. c. 90, s. 34. It is of general, not of local, application. It does not extend to moneys for which trade fixtures owned by the tenant are insured by him. (*Re Barker, Ex pte. Gorely*, 4 De G. J. & S. 477.)

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24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such a person as he thinks fit to be receiver.

Sect. 24. Appointment, powers, remuneration, and duties of receiver.

It will still be necessary expressly to provide for the appointment of a receiver, when it is desired either to exercise the power before the mortgage money has become due, or before the time at which the statutory power of sale would become exerciseable; as to which, see s. 20, p. 89, *ante*. If the mortgage money is payable by instalments, the deed should provide that the power may be exercised upon default in payment of any instalment.

This sub-section seems to apply to any modified power of sale introduced into the mortgage deed by virtue of s. 19, sub-s. (2), p. 89, *ante*.

The mere fact of the appointment of a receiver will not prevent the mortgagee from specially indorsing a writ, under Ord. XIV., in an action to recover the mortgage money; but, as it may raise a doubt as to the precise sum to which the plaintiff is entitled, it may be a good reason for granting leave to defend. (*Lynde* v. *Waithman*, 1895, 2 Q. B. 180; explaining *E. Poulett* v. *Visct. Hill*, 1893, 1 Ch. 277.)

See notes on s. 19, sub-s. (1) (iii.), p. 87, *ante*.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

A receiver is the agent of the mortgagor only for the purposes coming within the terms of the power under which he is appointed. (*Re Hale, Lilley* v. *Foad*, 1899, 2 Ch. 107.)

When a receiver has been appointed, the Court will restrain the mortgagor from distraining for rent, even though the receiver is negligent. (*Bayley* v. *Went*, W. N. 1884, p. 197; 51 L. T. 764; and see *Woolston* v. *Ross*, 1900, 1 Ch. 788.) A receiver appointed under the power formerly usual in mortgage deeds was for all purposes the agent of the mortgagor. (*Jefferys* v. *Dickson*, L. R. 1 Ch. 183. See also *Law* v. *Glenn*, L. R. 2 Ch. 634, at p. 641; and cf. *Re Vimbos*, 1900, 1 Ch. 470.) But in the absence of a provision making the receiver the agent of the mortgagor, he is the agent of the mortgagee, who appoints him,

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and who is therefore liable for debts incurred by him. (*Robinson Printing Co.* v. *Chic*, 1905, 2 Ch. 123.)

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

Instead of the words, "in the name either of the mortgagor or of the mortgagee," the corresponding section (s. 19) of Lord Cranworth's Act had the words, "in the name either of the person *entitled to the property subject to* the charge, or of the person *entitled to the money secured by* the charge." In some cases the mortgagee is only a trustee; where, for example, a term is created to secure moneys to be paid in specified ways to specified persons. In such cases no distress could have been made, under the power conferred by Lord Cranworth's Act, in the name of the mortgagee, *i.e.*, the person in whom the term was vested. In many cases, such termor might distrain at common law; viz., where he has, by virtue of his term, a legal reversion (whether by estoppel or in interest) upon the estate of the occupying tenant. But, by making a distress at common law, he would constitute himself mortgagee in possession.

In an Irish case, *Fairholme* v. *Kennedy*, 24 L. R. Ir. 498, a receiver appointed under the statutory power was allowed, on giving sufficient indemnity, to sue for rent in the name of the mortgagor's heir-at-law. And see, as to evidence on taking a receiver's accounts, *Re Della Rocella's Estate*, 29 L. R. Ir. 464, cited p. 88, *ante*.

The appointment of a receiver deprives the mortgagor of his power to distrain for rent payable under a lease granted by him under s. 18, even if the receiver refuses to distrain. (*Woolston* v. *Ross*, 1900, 1 Ch. 788.)

If the mortgagor's estate is determined by forfeiture, and the receiver afterwards distrains upon an under-tenant, he is liable for wrongful distress. (*Serjeant* v. *Nash, Field & Co.*, 1903, 2 K. B. 304.)

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

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(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely) :

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property ; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the costs of executing necessary or proper repairs directed in writing by the mortgagee ; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage ;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

The power to appoint a receiver benefits the mortgagee by practically enabling him to obtain most of the advantages of taking possession without incurring its liabilities.

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The receiver is defined by s. 19, sub-s. (1), (iii.), p. 87, *ante*, to be a "receiver of the income of the mortgaged property." The Act gives him no power of leasing. Since he is expressly made the agent of the mortgagor (sub-s. (2), *supra*), it is submitted that his appointment does not oust the mortgagor from possession, and that the mortgagor solely retains the power conferred by s. 18, p. 77, *ante*, of making leases.

The foregoing power to pay the cost of repairs was not contained in the corresponding clauses of Lord Cranworth's Act. Unless the repairs are directed in writing, they will not be allowed in the mortgagee's account. (*White* v. *Metcalf*, 1903, 2 Ch. 567.)

The provisions of sub-s. (8) only apply between the mortgagor and the mortgagee; they do not give the landlord or other person to whom payments are therein directed to be made any right against the receiver. (*Hand* v. *Blow*, 1901, 2 Ch. 721.)

Any mortgagee may appoint a receiver, but a receiver appointed by a puisne mortgagee will be liable to be ousted by one subsequently appointed by a prior incumbrancer.

Before the Judicature Act, 1873, s. 25, sub-s. (8), a legal mortgagee, or an equitable mortgagee having an express power to distrain, or the owner of a rent-charge, or the owner of a rent-seck, since he had a power to distrain by virtue of 4 Geo. 2, c. 28, s. 5, could not have obtained the appointment of a receiver by the Court.

Interest "accruing due" under sub-s. (iv.) includes interest due at the date of the appointment of the receiver. (*National Bank* v. *Kenney*, 1898, 1 I. R. 197.)

Quære whether a receiver appointed under the section is justified in making a payment on account of an unsecured debt owed by the mortgagor. (*Re Hale, Lilley* v. *Foad*, 1899, 2 Ch. 107.)

The mortgagor may get the benefit of the bond guaranteeing the receiver's discharge of his duties after the mortgage has been satisfied. (*Kenney* v. *Employers' Liability Assurance Corporation*, 1901, 1 I. R. 301.)

Action respecting Mortgage.

Sect. 25. Sale of mortgaged property in action for foreclosure, &c.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

By Jud. Act, 1873, s. 34, sub-s. (3), all causes and matters for (*inter alia*) the sale of real estates are assigned to the Chancery Division. As to sales by the Court, see generally R. S. C. 1883, Ord. 51; and as to sales in debenture-holders' actions, see the additional r. 1B, made in 1893.

This sub-section refers only to redemption actions, while

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sub-s. (2), *infra*, refers also to foreclosure actions and to actions by puisne mortgagees to realize their security. Under this sub-section, the order for sale appears to be a matter of right, but subject, so far as the Court thinks fit, to the precautionary restrictions specified in sub-s. (3), *infra*. (*Clarke* v. *Pannell*, 29 Sol. Journ. 147.) But in such a case, if the mortgagee should oppose the sale, the Court would probably fix a reserved price sufficient to cover the mortgagee's claim. Under sub-s. (2), the making of the order seems to be wholly in the discretion of the Court.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

This sub-section replaces and enlarges the Chancery Procedure Act, 1852, 15 & 16 Vict. c. 86, s. 46; repealed by sub-s. (6), *infra*. That enactment referred only to foreclosure actions. The present section embraces also redemption actions and actions for sale simply.

It is now considered to be settled law, that an equitable mortgagee, though without any agreement to execute a legal mortgage, is entitled to foreclose, not merely the deposited deeds, but the mortgagor's estate in the lands comprised therein. (*Per* James, L.J., in *Marshall* v. *Shrewsbury*, L. R. 10 Ch. 250, at p. 254.) If he had an agreement to execute a legal mortgage, he might formerly have had a sale. (*York Union Bkg. Co.* v. *Astley*, 11 Ch. D. 205.) But not in the absence of such agreement. (*Backhouse* v. *Charlton*, 8 Ch. D. 444.) The right to foreclose now of course implies, under the present sub-section, the right to ask for a sale. (*Oldham* v. *Stringer*, W. N. 1884, p. 235; 33 W. R. 251.)

An order for sale may be made upon interlocutory application before the trial (*Woolley* v. *Colman*, 21 Ch. D. 169); and at any time up to foreclosure absolute. (*Union Bank of London* v. *Ingram*, 20 Ch. D. 463.)

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In *Weston* v. *Davidson*, W. N. 1882, p. 28, an order for sale was made at the time of moving for foreclosure absolute; but the defendant asking for the sale was ordered to pay into Court a sum sufficient to meet the expenses of the sale.

An order for sale will not be made in an action brought by one of two tenants in common of land for a partition or sale, against the wish of the other tenant in common, to whom he has mortgaged his own share. (*Gibbs* v. *Haydon*, 30 W. R. 726.)

Under the old practice, which, so far at least as sales in foreclosure actions are concerned, seems to afford still available precedent, a sale would not be ordered, even at the request of the legal mortgagee, except where it would be for the benefit of all parties, and so as not to injure any one (*Hurst* v. *H.*, 16 Beav. 372); or where special circumstances rendered it desirable. (*Robert* v. *Price*, 1 W. R. 303.) The conduct of the sale would be given to the first mortgagee, if expense could be thereby saved. (*Hewitt* v. *Nanson*, 7 W. R. 5.) But where the security is ample, the Court is inclined to give the conduct of the sale to "the parties interested in obtaining the largest price, rather than to those who are only interested in obtaining what is sufficient to cover their security." (*Per* Chitty, J., in *Manchester and Salford Bank* v. *Scowcroft*, 27 Sol. Journ. 517. See also *Woolley* v. *Colman*, 21 Ch. D. 169; *Davies* v. *Wright*, 32 Ch. D. 220.) But there is no absolute rule to this effect. (See *Christy* v. *Van Tromp*, W. N. 1886, p. 111.) When an order for sale is made against the wish of the first mortgagee or the conduct of the sale is given to any other party, a sum of money must generally be deposited in Court sufficient to cover the expenses of an abortive attempt to sell, and a reserve bidding will be fixed sufficient to satisfy what is due under the first mortgage. (See *Whitbread* v. *Roberts*, 28 L. J. Ch. 431; *S. C. sub nom. Whitfield* v. *Roberts*, 5 Jur. N. S. 113; *Manchester and Salford Bank* v. *Scowcroft, supra.*) But if the interests of the first mortgagee cannot suffer injury, another party may be allowed to sell without giving security for the costs. (*Davies* v. *Wright*, 32 Ch. D. 220.) Before a sale is ordered upon the application of the mortgagor alone, he must deposit in Court a sufficient sum to meet the costs of an abortive sale. (*Lingard-Moncke* v. *Jenkins*, L. J. Notes, 1883, p. 18.)

In foreclosure actions, where the security is deficient, or where its sufficiency does not appear, the Court will not readily order a sale against the wish of the first mortgagee. (*Merchant Banking Co. of Lond.* v. *London &c. Bank*, W. N. 1886, p. 5, 55 L. J. Ch. 479; *Provident &c. Association* v. *Lewis*, W. N. 1892, p. 164, 62 L. J. Ch. 89.) But under special circumstances such sale may be ordered, conditions being imposed to protect the first mortgagee against loss. (*Norman* v. *Beaumont*, W. N. 1893, p. 45.) This may be done even though the first mortgagee states that he is desirous of exercising his power of sale, if he has not taken any steps for doing so, and if it appears probable

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that the sale will be more successfully conducted by the mortgagor. (*Brewer* v. *Square*, 1892, 2 Ch. 111.)

Sales may be ordered to be made out of Court. (*Davies* v. *Wright*, 32 Ch. D. 220; *Brewer* v. *Square*, *supra*.)

In *Wade* v. *Wilson* (No. 1), 22 Ch. D. 235, where the mortgagor had not appeared, and a puisne mortgagee had made default in pleading, the mortgagee asked for an immediate sale; but the Court ordered that an account should first be taken of what was due, and that, after such account had been certified, the property, or so much as would suffice to satisfy the plaintiff's claim, should be sold.

In an action in which only foreclosure was claimed, the Court refused to order a sale in the absence of the mortgagor, who had no notice of the application for a sale. (*S. W. Dist. Bank* v. *Turner*, 31 W. R. 113.)

In *Charlewood* v. *Hammer*, 28 Sol. Journ. 710, the defendant had appeared to the writ, but delivered no defence. On a motion for judgment in default of pleading, the plaintiff obtained leave to sell unless the defendant redeemed within ten days after the chief clerk's certificate. But in that case it appeared that the security was clearly deficient.

If an order for sale is made under this sub-section upon the application of the mortgagee, a time will be fixed for redemption. In *Wade* v. *Wilson* (No. 1), 22 Ch. D. 235, one month was allowed; in *Green* v. *Biggs*, W. N. 1885, p. 128, 52 L. T. 680, and in *Jones* v. *Harris*, W. N. 1887, p. 10, 52 L. T. 884, three months.

There is no inconsistency between the power of sale given by s. 25 and that given by s. 19, but the mortgagee cannot exercise the power given by s. 19 after obtaining a decree *nisi* for foreclosure without the leave of the Court. (*Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857.)

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within the section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

In *General Credit &c. Company* v. *Glegg*, 22 Ch. D. 549, foreclosure was ordered with a single time for redemption as against the mortgagor and the puisne mortgagees (as in *Bartlett* v. *Rees*, L. R. 12 Eq. 395) without determining the priorities *inter se* of the puisne mortgagees, but without prejudice to their

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respective rights. In *Smith* v. *Olding*, 25 Ch. D. 462, a single time for redemption was given, where the second mortgagee had postponed his own security and had become surety for the mortgagor, and neither defendant appeared. (See also *Doble* v. *Manley*, 28 Ch. D. 664; *Lewis* v. *Aberdare &c. Co.*, W. N. 1884, p. 116, 53 L. J. Ch. 741.) The rule now is, that only one period will be given where the persons entitled to redeem do not appear and ask for successive periods. A further time will be given at the request of a subsequent incumbrancer, but not of the mortgagor, where there is no conflict as to priorities. (*Platt* v. *Mendel*, 27 Ch. D. 246; for the form of order, see 32 W. R. at p. 920.)

(5.) This section applies to actions brought either before or after the commencement of this Act.

15 & 16 Vict. c. 86, s. 48.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.

(7.) This section does not extend to Ireland.

V.—Statutory Mortgage.

Sect. 26. Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money.

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Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

It is believed to be the general opinion that the statutory forms mentioned in this and the following sections ought only to be used in simple cases and for securing small amounts.

A mortgagor, in cases where these forms are adopted, will have the right to require a transfer instead of a re-conveyance, under s. 15, p. 72, *ante*. The observations upon the incidents to mortgages appearing elsewhere in these notes will apply generally to statutory mortgages.

Sect. 59, sub-s. (2), p. 154, *post*, provides that the covenants implied in a statutory mortgage, by virtue of this section, and of s. 7, p. 43, *ante*, shall bind the realty as well as the personalty of the mortgagor.

Sect. 26 does not impose on the assignee of the equity of redemption a personal liability to pay the mortgage debt. (*Re Errington*, 1894, 1 Q. B. 11, 14.)

Sect. 27. Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest hen due, if any, and thenceforth to become due,

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thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee :

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely) :

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

The statutory form of transfer will not pass the legal estate in a mortgage which is not a statutory mortgage. (*Re Beachey, Heaton* v. *Beachey*, 1904, 1 Ch. 67.)

With regard to form (C.), it is to be observed, that the mortgagor is expressed to convey only *as beneficial owner*, and not *as mortgagor*. (See s. 26, sub-s. (2), *ante*.) Therefore this form implies no covenant to pay the further advances, but only transfers the benefit of the existing covenant to pay the old debt and interest. The form should be varied by inserting the words "as mortgagor and" before the words "as beneficial owner," whenever a further advance is made.

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The same remark applies to all cases in which the "mortgagor" is not the original mortgagor, and it is desired by the transferee to obtain a new covenant for payment of the old debt.

The insertion of a new proviso for redemption does not of itself constitute the document a new mortgage. (See *Barham* v. *E. of Thanet*, 3 My. & K. 607.) It is presumed that its implication will receive a similar construction.

In a deed of transfer of mortgage, the insertion of a new proviso for redemption does not prevent the deed from being a "transfer" within the meaning of the Stamp Act, 1870. (See *Wale* v. *Commrs. of Inl. Rev.*, 4 Ex. D. 270.) Where a further advance is included, mortgage stamp duty will be payable on the new debt, and transfer stamp duty on the old. (*Ibid.*) This applies equally to the Stamp Act, 1891.

Sect. 28. Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Sect. 29. Form of re-conveyance of statutory mortgage in schedule.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

VI.—Trust and Mortgage Estates on Death.

Sect. 30. Devolution of trust and mortgage estates on death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal

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[*See the Land Transfer Act*, 1897, 60 & 61 *Vict. c.* 65, *s.* 1.]

representatives or representative from time to time in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

This section renders superfluous and inoperative the devise of trust and mortgage freehold estates formerly inserted in wills. The Land Transfer Act, 1897, s. 1, extends the same principle to cases of beneficial ownership. As to copyholds, see below.

The section merely substitutes legal personal representatives for the heir. It gives them no powers additional to those which the heir would have had. (*Re Crunden and Meux*, W. N. 1909, p. 60.)

It would seem that when there is no personal representative the freehold will be in abeyance. In such a case limited administration might be applied for, and it would probably, if the estate were insolvent, be restricted to the subject of the trust. (See *In the Goods of Prothero*, L. R. 3 P. & M. 209.)

The question as to the abeyance of the freehold was referred to, but not answered, by Pearson, J., in *Re Pilling*, 26 Ch. D. 432. The question was evaded in *Re Rackstraw*, W. N. 1885, p. 73, 33 W. R. 559, and *Re Williams*, 36 Ch. D. 231, by ordering that the property should vest in the new trustees for all such estate and interest as was vested in the deceased trustee at the time of his death.

When estates of inheritance, vested in a trustee or mortgagee who dies solely seised, "devolve to and become vested in his personal representatives in like manner as if" they were chattels real, there seems to be no strong reason why courts of probate should refuse to assume jurisdiction to grant administration of freeholds devolving in that manner, even though there should be no personalty to administer. But the authors were informed that the officials of the Probate Division, in reply to an application, expressed a doubt whether such limited administration would be granted.

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The Land Transfer Act, 1897, s. 1, sub-s. (3), enacts that probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

The assignment of a term of years by one of several executors of a deceased lessee is valid (Dyer, 23 b, pl. 146); and one administrator stands in this respect on the same footing as one executor. (*Jacomb* v. *Harwood*, 2 Ves. sen. 265.) It would, therefore, seem probable that under this section one of several personal representatives can convey freehold trust estates or re-convey freehold mortgage estates.

An executor who acquires the legal estate under this section cannot exercise a power of sale, unless the power would have been exerciseable by the testator's heir if the estate had descended to him. (*Re Ingleby &c. Co.*, 13 L. R. Ir. 326.) As to the exercise of powers by the heir of the last surviving trustee, see *Re Morton and Hallett*, 15 Ch. D. 143; *Re Cunningham and Frayling*, 1891, 2 Ch. 567; *Re Pixton and Tong*, 46 W. R. 187, W. N. 1897, p. 178.

The fact that the executors of the last surviving trustee have acted in the trusts does not prevent the person entitled to appoint new trustees from making a valid appointment, and such new trustees may call upon the executors to hand over all the trust deeds and documents. (*Re Routledge's Trusts, Saul* v. *Routledge*, 1909, 1 Ch. 280.)

It seems to have been contended, in *Re Clowes*, 1893, 1 Ch. 214, that the present section, taken in connection with ss. 23, 24, of the Wills Act, would cause a specific devise of land to take effect as a specific bequest of a sum of money subsequently charged upon the land in favour of the testator, where the testator sells and conveys the land subsequently to the execution of his will, and takes a re-conveyance by way of mortgage to secure a part of the purchase-money. That such a contention should have been raised, is more surprising than that it should not have succeeded.

Under the section a devise by a testatrix to the persons who at the time of her death should be the trustees of her father's will operates in favour of the executors of the surviving trustee of the father's will where all the trustees were dead at the death of the testatrix. (*Re Waidanis, Rivers* v. *W.*, 1908, 1 Ch. 123.)

As to copyholds.

It was held by Kay, J., in *Re Hughes*, W. N. 1884, p. 53, and by North, J., in *Heslop* v. *Richmond*, 21 L. J. Notes, p. 29, that this section extends to copyholds. The decision of Bacon, V.-C., referred to in *Hall* v. *Bromley*, 35 Ch. D. 642, at p. 645, was to the same effect; but in the case itself of *Hall* v. *Bromley*, the question did not arise, because the executors had previously acquiesced in the decision of Bacon, V.-C., and had taken admittance. In *Re Mills' Trusts*, 37 Ch. D. 312, North, J., appears to have assumed that the section refers to copyholds. But it may well be doubted whether so grave an interference with the law of tenure should be imported by implication. The Copyhold Act, 1894, s. 88, replacing the Copyhold Act, 1887,

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s. 45, renders it unnecessary for general purposes to examine this question: enacting as follows:—

57 & 58 Vict. c. 46, s. 88.

"Section thirty of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust, or by way of mortgage."

But this enactment does not extend to the case of a mortgagee or trustee who has obtained a surrender, and has died before admittance. Therefore the question, whether the present section originally applied to copyholds, is still by possibility capable of arising.

In *Re Mills' Trusts, supra*, North, J., held that, in the case of a person dying in the interval between the commencement of the present Act and the Copyhold Act above cited, the legal estate in copyholds was shifted, by the passing of the latter Act, from the personal representatives to the customary heir or devisee, but that any disposition of the copyholds made by the personal representatives before the passing of the Copyhold Act would have been valid. The case was re-argued, W. N. 1888, p. 155, when North, J., adhered to his former opinion, and his decision was sustained by the Court of Appeal, 40 Ch. D. 14, but upon grounds which made it unnecessary to express any opinion as to the effect upon copyholds of the present section, or supposing them to be within it, as to the effect of the Copyhold Act, 1887.

As this section does not now apply to copyholds, the old rules as to the construction of devises, with regard to the inclusion or exclusion of trust and mortgage estates, will, of course, apply to them. (See, for example, *Re Franklyn's Mortgages*, W. N. 1888, p. 217.)

37 & 38 Vict. c. 78. 38 & 39 Vict. c. 87.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

Sect. 4 of the V. and P. Act, 1874, provided that the legal personal representative might convey the legal estate in mortgaged property. That section did not enable the personal representative to convey on a sale made under a power contained in the mortgage. (*Re White*, 51 L. J. Ch. 856.) Sect. 48 of the Land Transfer Act, 1875, 38 & 39 Vict. c. 87, repealed s. 5 of the V. and P. Act, 1874, which provided that a bare legal estate in fee simple outstanding in a trustee should vest in the executor or administrator, and enacted that the aforesaid provision should only apply where the trustee died intestate. Its repeal, of course, does not re-enact the section repealed by it.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

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VII.—*Trustees and Executors.*

Appointment of new trustees, vesting of trust property, &c.

31.—(1.) *Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.*

(2.) *On an appointment of a new trustee, the number of trustees may be increased.*

(3.) *On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.*

(4.) *On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.*

(5.) *Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.*

(6.) *The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring*

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trustee, if willing to act in the execution of the provisions of this section.

(7.) *This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

(8.) *This section applies to trusts created either before or after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and the major part of s. 10 of that Act is substituted for it. (See p. 387, *post*.)

Sect. 32. *Retirement of trustee.*

32.—(1.) *Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.*

(2.) *Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.*

(3.) *This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

(4.) *This section applies to trusts created either before or after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 11 of that Act is substituted for it. (See p. 394, *post*.)

Sect. 33. *Powers of new trustee appointed by Court.*

33.—(1.) *Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or*

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by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(2.) *This section applies to appointments made either before or after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 37 of that Act is substituted for it. (See p. 422, *post.*)

Sect. 34.
Vesting of trust property in new or continuing trustees.

34.—(1.) *Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.*

(2.) *Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other persons, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.*

(3.) *This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.*

(4.) *For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.*

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(5.) *This section applies only to deeds executed after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 12 of that Act is substituted for it. (See p. 395, *post.*)

Sect. 35. *Power for trustees for sale to sell by auction, &c.*

35.—(1.) *Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.*

(2.) *This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.*

(3.) *This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 13 of that Act is substituted for it. (See p. 398, *post.*)

Sect. 36 *Trustees' receipts.*

36.—(1.) *The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.*

(2.) *This section applies to trusts created either before or after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 20 of that Act is substituted for it. (See p. 404, *post.*)

Sect. 37. *Power for executors and trustees to compound, &c.*

37.—(1.) *An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.*

(2.) *An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized*

to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

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(3.) *As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.*

(4.) *This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 21 of that Act is substituted for it. (See p. 405, *post.*)

38.—(1.) *Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.*

Sect. 38. *Powers to two or more executors or trustees.*

(2.) *This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 22 of that Act is substituted for it. (See p. 407, *post.*)

VIII.—Married Women.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for

Sect. 39. Power for Court to bind interest of

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married woman.

her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Applications under this section must be made by summons at chambers (s. 69, sub-s. (3), p. 169, *post*), and not on petition. (*Re Lillwall's Settmt. Trusts*, W. N. 1882, p. 6.) *Sed quære;* see *Re Blundell*, 1901, 2 Ch. 221.

An order may be made under the powers given by this section, upon a petition intituled in the Settled Estates Act, 1877, without the petition being also intituled under the present Act. (*Landfield* v. *Landfield*, 30 W. R. 377; *Latham* v. *Latham*, W. N. 1889, p. 171.)

It seems that this section was primarily intended to alter the law declared in *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535, where it was held that the Court could not permit a married woman to alienate her restrained property, even to the manifest advantage of her estate.

There is no estoppel by deed against a married woman, in respect to property as to which she is restrained from anticipation. (*Lady Bateman* v. *Faber*, 1897, 2 Ch. 223; 1898, 1 Ch. 144.)

It is proper to accompany the application with at least the outline of a scheme, if it is sought to raise money; and the Court will probably not consider it beneficial if the proposed rate of interest is excessive, or the terms onerous in other respects; *e.g.*, a stipulation to mortgage the property and to insure a life by way of collateral security, would generally be deemed excessive.

It seems that the Court, by order made after the commencement of the Act, might, with the married woman's consent, validate a deed executed before the commencement of the Act purporting to bind her interest.

It has been held by Fry, J., that the married woman need not be separately examined as to her consent. (*Hodges* v. *Hodges*, 20 Ch. D. 749.) *Sed quære;* and, also, whether, if separate examination should hereafter be held to be necessary, the want of it would come within any of the cases provided for by s. 70, p. 170, *post*. In the later case of *Musgrave* v. *Sandeman*, 48 L. T. 215, Pollock, B., directed the married woman to be separately examined. In *Harris* v. *Harford*, W. N. 1888, p. 190, North, J., declined to lay down any fixed rule.

In *Shipway* v. *Ball*, 16 Ch. D. 376, Malins, V.-C., held that a married woman, being a minor, could not consent to waive her equity to a settlement. The same principle seems to apply to consents under this section.

In *Re Little's Will*, 36 Ch. D. 701, an order was made without serving the trustees, the transaction being a small one.

The Court has no power under this section to remove the restraint simply, but only to bind the interest of the married

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woman for the purpose of permitting a disposition to be made which is for her benefit. (*Re Warren's Settmt.*, W. N. 1883, p. 125; 52 L. J. Ch. 928.)

The restraint may be removed during a period, or till further order, so as to enable the income in the meantime to be applied in satisfaction of periodically recurring payments. (*Re Milner's Settmt.*, 1891, 3 Ch. 547.)

The restraint may be removed, in order to effect a change of investment: being re-imposed upon the new security. (*Re Millar*, 25 L. R. Ir. 107.) But the Court will not remove the restraint merely for the purpose of allowing the fund to be paid out of Court and re-invested in such a way as to produce a larger income. (*Re Blundell*, 1901, 2 Ch. 221.)

The power will not in ordinary cases be exercised if it appears that the real object is to pay the husband's debts with the wife's money. (*Re S——'s Settmt.*, *G——* v. *C——*, W. N. 1893, p. 127.) It must be clearly proved to the Court that it will be for the married woman's personal benefit to accede to the application. Even the desire to pay her own debts will not of necessity suffice as a compliance with this condition. The Court of Appeal expressed the opinion *obiter*, in the case of *Re Wood, W.* v. *Kimber*, The Times, 13th January, 1885; 29 Sol. Journ. 183, that, on a liberal interpretation of the Act, the power given by this section might be exercised not merely to promote the pecuniary benefit of the wife, and that a benefit to the husband and family might be also such a benefit to the wife as is contemplated by this section, but they refused to apply this doctrine in the case before them; and it is difficult to imagine a more favourable case.

The Court will not use its discretion under this section so as to enable a married woman, by releasing a power of appointment among children vested in her, to give an immediate interest in the fund. (*Re Little, Harrison* v. *H.*, 40 Ch. D. 418.) And in general the Court will not release the restraint in order to enable debts, which have been incurred by extravagance, to be paid. (*Re Pollard's Settmt.*, 1896, 1 Ch. 901; affd. 1896, 2 Ch. 552; *Paget* v. *Paget*, 1898, 1 Ch. 47, 55; *Re Giorgi, Giorgi* v. *Wood*, 45 Sol. Journ. 615.)

In *Hodges* v. *H.*, 20 Ch. D. 749, a married woman was the wife of a domiciled Frenchman, and her French creditors, being unfamiliar with restraint on anticipation, "harassed" her. The circumstances were considered exceptional, and relief was given. (See also *Re C.'s Settmt.*, 56 L. J. Ch. 556; *Latham* v. *L.*, W. N. 1889, p. 171.)

In a case where a husband had expended considerable sums in improving houses which were the separate property of his wife for her life, who was restrained from anticipation, and he had in consequence become much embarrassed in his circumstances, the Court of Appeal permitted a loan to be raised by mortgage of the wife's life interest, for the purpose of paying the husband's debts, upon condition that he was made primarily liable, and that the wife's life estate should be only a collateral

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security. (*Re A Marriage Settmt.*, 30 Sol. Journ. 702.) In a case where a married woman had joined with her husband in raising money by promissory notes, she was allowed to make her life interest liable to pay the interest on a loan contracted by him, and to pay the premiums on a policy on his life designed to recoup the trust funds. (*Re Waring and Colley's Settmt.*, 82 L. T. Newsp. 300.) In a proper case, a married woman may be permitted to mortgage her reversionary interest, as to which she is restrained from anticipation, to purchase a professional practice for her husband. (*Re Torrance's Settmt.*, 80 L. T. Newsp. 244; 81 *Ibid.* 118.)

If an order is made, with a view to facilitate payment of a husband's debts, he is not bound to indemnify the wife or her separate estate. (*Paget* v. *P.*, 1898, 1 Ch. 47. This was affirmed by the Court of Appeal (1898, 1 Ch. 470), where it was pointed out that what binds the estate of the married woman is the order of the Court, not what she does when the restraint is removed.)

A married woman, having a life interest with restraint on anticipation, being plaintiff in an action for the rectification of deeds on the ground of mistake, consented to pay the costs of all parties; and the Court, on the application of the defendant, with her consent, made an order binding her life interest for that purpose. (*Sedgwick* v. *Thomas*, 48 L. T. 100.) And for a somewhat similar order, see *Dowd* v. *D.*, 1898, 1 I. R. 244.

A mortgage debt was settled on a married woman for life without power of anticipation. She desired to provide funds for the purpose of emigration, and an order was made authorizing the sale of her life estate. (*Re Flood*, 11 L. R. Ir. 355.) The report contains the order *verbatim*.

In *Re Jordan, Kino* v. *Picard*, W. N. 1886, p. 6; 34 W. R. 270, the order was refused, it being doubtful whether a forfeiture of the married woman's interest might not be incurred.

In the following cases, also, the restraint has been removed on the ground that the proposed transaction was for the benefit of the married woman:—Where money was required to be raised for the purpose of carrying on a business for the benefit of a married woman living apart from her husband: *Ex pte. Thompson*, W. N. 1884, p. 28; where, owing to the restraint, a married woman was unable to sell property to which she was otherwise absolutely entitled: *Re Tippett and Newbould*, 37 Ch. D. 444; *Bates* v. *Kesterton*, 1896, 1 Ch. 159, 165; where a married woman, otherwise absolutely entitled, desired to consent to an advantageous investment, which was not within the terms of the trust: *Re Wright's Trusts*, 15 L. R. Ir. 331; but see *Re Blundell's Trusts*, 1901, 2 Ch. 221 (in which case leave was refused); where a married woman had mortgaged her interest in land, and there was danger of eviction for non-payment of head-rent, the restraint was removed for the purpose of enabling the mortgagees to sell under their power of sale, the sale being made at a full value: *Re Segrave's Trust*, 17 L. R. Ir. 373; where two married women were tenants in

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common, and their powers of dealing advantageously were impeded, the Court permitted a partition and re-settlement: *Re Currey, Gibson* v. *Way*, W. N. 1887, p. 28; 35 W. R. 326; to enable the trustees of a marriage settlement to obtain a loan to complete the purchase of an estate: *Re Tennant's Estate*, 25 L. R. Ir. 522; where relaxing the restraint enabled the married woman, besides paying her own debts, to compound on advantageous terms with her husband's creditors, who had an interest in the settled property: *Re Wilson-Stewart, Keown-Boyd* v. *Gilmour*, 75 L. T. 381; to enable a son to be started in life, whereby his parents would be relieved from his maintenance: *Re Sawyer's Trusts*, 1896, 1 I. R. 40; to enable certain mortgages, over which a married woman's jointure had priority, to be paid out of purchase-money: *Re Marquis of Ailesbury* v. *Lord Iveagh*, 1893, 2 Ch. 345.

The powers conferred by S. L. Act, 1882, can be exercised by a married woman without application to the Court, notwithstanding that she is restrained from anticipation. (See s. 61, sub-s. (6), of that Act, p. 332, *post*.)

This section has no application after a decree for divorce absolute. (*Thomson* v. *T.*, 1896, P. 263.)

Sect. 40. Power of attorney of married woman.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

A deed executed by an attorney appointed by virtue of this section, will of course require to be separately acknowledged in all cases in which separate acknowledgments would be required if the deed were executed by the married woman.

As to acknowledgments by married women, see now Conv. Act, 1882, s. 7, and note at p. 195, *post*.

There seems to be nothing to prevent a married woman from irrevocably appointing an attorney, under s. 8 or s. 9 of the Conv. Act, 1882. It therefore seems that, notwithstanding this section, income, as to which she is restrained from anticipation, ought not in general to be paid to an attorney. (*Kenrick* v. *Wood*, L. R. 9 Eq. 333; but see the observation of Chitty, J., in *Stewart* v. *Fletcher*, 38 Ch. D. at p. 628.) Otherwise she might be able to evade the restraint; and it was formerly well established, that the restraint cannot be released or evaded, even for the purpose of recouping loss occasioned by deliberate fraud to which the married woman was herself a party. (See

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Clive v. *Carew*, 1 J. & H. 199; *Stanley* v. *S.*, 7 Ch. D. 589.) But the Trustee Act, 1888, s. 6, now replaced by the Trustee Act, 1893, s. 45, p. 426, *post*, altered this rule. Upon the same principle, election could not be enforced against a married woman, restrained from anticipation. (*Re Vardon*, 31 Ch. D. 275, and cases there referred to.) In *Stewart* v. *Fletcher*, 38 Ch. D. 627, an order was made for payment of the income of a fund in Court to an attorney, but only on an affidavit or statutory declaration that he received it on behalf of the married woman, and not of any other person to whom she had purported to assign it. This order was made upon the ground that the married woman was about to go to India, and that the expense of executing a fresh power of attorney after the accrual of each dividend would have been unreasonably large. In such a case, the fact of the restraint ought to appear on the face of the order. (*Ibid.*)

As to powers of attorney, see sects. 46—48, pp. 137—142, *post*; and as to irrevocable powers, see Conv. Act, 1882, sects. 8 and 9, p. 195, *post*.

IX.—Infants.

Sect. 41. Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

It has been held that the case of an infant who, under an executory limitation, will become entitled to lands in fee simple contingently upon his attaining the age of twenty-four, or dying under that age leaving issue, comes within this section pending the contingency. (*Re Sparrow's S. E.*, 1892, 1 Ch. 412.) The learned judge appears to have considered that *Re Liddell*, W. N. 1882, p. 183; 31 W. R. 238, was precisely in point. But there seems to be a material distinction between the two cases. In *Re Liddell* the infant was entitled subject to an executory limitation in favour of other persons; in *Re Sparrow's S. E.* he had no seisin or present interest at all, but only a future interest to arise under an executory limitation in favour of himself.

The operation of this section will probably be to a great extent superseded by sects. 59 and 60 of S. L. Act, 1882, p. 329, *post*.

Previously to this enactment the Courts had no power to sell an infant's lands, except under special statutes, such as the Partition Act. (See *Calvert* v. *Godfrey*, 6 Beav. 97; *Blacklow* v. *Laws*, 2 Ha. 40; Dart, V. & P. 5th ed. c. 21, s. 5; 6th ed. c. 20, s. 5, p. 1350.)

By s. 4 of the Settled Estates Act, 1877, which re-enacted sects. 2 and 4 of the Act of 1856, the Court can authorize leases

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of settled estates. The interpretation clause includes among settled estates, "all hereditaments of any tenure, and all estates or interests in any such hereditaments which are the subject of a settlement."

By s. 16 of the same Act, which re-enacted s. 11 of the Act of 1856, the Court has power to authorize a sale of a settled estate, or of timber, not being ornamental timber.

By sects. 46 and 49 of the same Act, which re-enacted and extended sects. 32 and 36 of the Act of 1856, tenants for life, or the guardians of infant tenants for life, are empowered to grant leases of any part of the settled estates, except the principal mansion-house and lands usually occupied therewith; and though the fact of making an infant's estate a "settled estate" did not necessarily make an infant owner in fee a "tenant for life," it was thought that the power given to the guardians of infant tenants for life would be extended to the guardians of infant owners in fee. This difficulty, however, is laid at rest by sects. 59 and 60 of S. L. Act, 1882, p. 329, *post*, of which the former enacts that an infant owner, if entitled in possession, shall be deemed a tenant for life, and the latter enacts that his statutory powers may be exercised on his behalf by the trustees of the settlement, or, if there are none, by some person to be appointed by the Court, on the application of the guardian or next friend of the infant owner.

Sect. 42. Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

The language of this section points only to the case of infants taking under a settlement, that is, a disposition which creates successive interests, but it has been held to include infants taking by descent, or otherwise entitled in fee simple. (*Re Cowley*, 1901, 1 Ch. 38, following *Re Glover*, 1899, 1 I. R. 337.)

If land is given on trust for sale, with a trust of the rents and

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profits until sale in favour of a specified person, such person, until the land is sold, is "beneficially entitled to the possession of" the land, within the meaning of this Act. See s. 2, sub-s. (iii.), p. 12, *ante*. In other cases of land given in trust for sale, s. 43 applies, and express powers of management ought to be inserted.

Trustees appointed under s. 60 of the Settled Land Act, 1882, to exercise the powers of an infant tenant for life are not trustees with power of sale of settled land within the meaning of this section. (*Re Helyar*, 1902, 1 Ch. 391.)

Trustees for the purposes of this section may be appointed on summons. (*Re Clay, C.* v. *C.*, 30 Sol. Journ. 619.) See also s. 69, sub-s. (3), p. 169, *post*.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

Trustees may also insure under s. 18 of the Trustee Act, 1893. See the section and note thereto, p. 401, *post*.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

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This section does not authorize the trustees to expend corpus in expenses of management. If the income should be insufficient, recourse may be had to the Court, which has jurisdiction to direct money for repairs to be raised by mortgage or otherwise. (*Re Jackson, J.* v. *Talbot*, 21 Ch. D. 786.)

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's

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personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

The case of a married woman, being an infant, seems not to be within this section. Sub-s. (5), (ii.), *supra*, deals only with the application of past accumulations at the time of the female infant's marriage, upon which event they become payable, and the powers of the trustees appear to cease.

The aim of this section seems to have been, to supersede the necessity of inserting, in strict settlement of real estate, directions relating to the application of the income of the settled estates during the minority of any tenant for life or tenant in tail. This would account for the fact that its language, without expressly excluding the case of infants who are otherwise entitled, is well adapted to refer only to the above-mentioned cases.

Sect. 43. Application by trustees of income of property of infant for maintenance, &c.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or

any person bound by law to provide for the infant's maintenance or education, or not. C. A. 1881, Sect. 43.

The Act confers no power of advancement. As to when interest should be charged on advances, see *Re Dallmeyer, D.* v. *D.*, 1896, 1 Ch. 372.

An executor having in his hands funds to which an infant is entitled, is a trustee thereof for the purposes of this section. (*Re Smith, Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302.) So also is an administrator with the will annexed. (*Re Adams, Verrier* v. *Haskins*, W. N. 1906, p. 220.)

This section replaces s. 26 of Lord Cranworth's Act. Under that Act it was decided in *Re Cotton*, 1 Ch. D. 232, that income to which the infant was only entitled contingently might be applied for maintenance; and in *Re George*, 5 Ch. D. 837, that income to which the infant was not entitled at all, though he was contingently entitled to the corpus from which it arose, might not be so applied. Though the language of the present sub-section presents some marked differences, it has been decided that the same rule of construction is applicable. (*Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331; *Re Bowlby*, 1904, 2 Ch. 685.) It follows that, in cases where the right to income is not a vested interest, the question as to maintenance depends upon whether there is a right to the income, contingent upon the subsequent vesting of the corpus.

In *Re Judkin*, 25 Ch. D. 743, the judge pointed out that the present section applies only in cases where the infant is entitled to the corpus *on or before* attaining the age of twenty-one years. In that case, the infants did not become entitled until the happening of an event which would not necessarily occur at or before that time; and it was held that this would have sufficed to prevent the income from being applicable for maintenance under the present section. See also *Re Breed*, 1 Ch. D. 226, in which case an unsuccessful attempt was made to apply the provisions of Lord Cranworth's Act in respect of maintenance after an infant had attained majority, the fund not being payable until the attainment of the age of twenty-five.

In *Re Cotton*, 1 Ch. D. 232, Jessel, M.R., expressed an opinion that the word "guardian" in Lord Cranworth's Act included the father, as guardian by nature.

A future devise of real estate, standing alone, confers no rights to the intermediate rents and profits. (*E. of Bective* v. *Hodgson*, 10 H. L. C. 656; *Holmes* v. *Prescott*, 12 W. R. 636.) And it makes no difference if the devise is residuary. (*Ibid.*) Or whether the estate be legal or equitable. (*Re Averill, Salsbury* v. *Buckle*, 1898, 1 Ch. 523.) Therefore maintenance cannot be allowed.

Though a specific, or pecuniary, legacy will not, if deferred, generally confer even a contingent right to the intermediate income, there are some exceptions from the rule; and in the latter cases maintenance can be allowed. A deferred bequest of residuary personalty gives a contingent right to the income,

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at least for as long a period as is allowed for its accumulation. (*Green* v. *Ekins*, 2 Atk. 473; *E. of Bective* v. *Hodgson*, *supra*.) So also if a contingent legacy is directed to be set apart from the rest of the estate. (*Re Medlock*, *Ruffle* v. *Medlock*, 55 L. J. Ch. 738; *Re Clements*, *C.* v. *Pearsall*, 1894, 1 Ch. 665; *Re Woodin*, *W.* v. *Glass*, 1895, 2 Ch. 309.) But if the contingent legacy is not segregated by the will the section does not apply until there has been an appropriation in satisfaction of it by the trustees. (*Per* Cozens-Hardy, L.J., in *Re Bowlby*, *supra*, at p. 714.) Also, if the testator stands *in loco parentis* to the legatee, and the latter is an infant, and the testator has not otherwise provided for his maintenance, the income of the fund is applicable for maintenance under the jurisdiction of the Court. (*Re George*, W. N. 1876, p. 298; 25 W. R. 182.) But the child acquires no vested interest therein, and, in the absence of a direction in the will, this section will not apply. (*Re Bowlby*, *supra*.) See further as to the cases in which a deferred gift does or does not carry with it the intermediate income, 2 Wh. & Tu. 5th ed. p. 293; 6th ed. p. 312; *Re Inman*, *I.* v. *Rolls*, 1893, 3 Ch. 518; *Re Moody*, *Woodroffe* v. *Moody*, 1895, 1 Ch. 101.

If there is a mixed devise and bequest, comprising both realty and personalty, and if the beneficiary is contingently entitled to the income of the personalty, maintenance may be given out of the income of the realty also. (*Re Burton*, *Banks* v. *Heaven*, 1892, 2 Ch. 38.)

When several infants are entitled to a fund contingently on attaining twenty-one, and the right to the intermediate income depends upon the right to the corpus, as to which there is a suspense of vesting while all the infants are under age, it is a reasonable deduction that they may be maintained out of income. (See *Re Adams*, cited below.) But on the question whether maintenance could be allowed to the others after one had attained the age of vesting, there was for some time a conflict of judicial opinion. In *Re Jeffery*, *Burt* v. *Arnold*, 1891, 1 Ch. 671, North, J., holding that the whole of the corpus thereupon became vested (liable, of course, to be partially devested) in the first child, and that the right to the whole income became (for the time) vested along with the right to the corpus, held also, upon the principle of *Re Dickson*, *Hill* v. *Grant*, 29 Ch. D. 331, that no part of the income could subsequently be applied for the maintenance of the younger children before they respectively attained the age of vesting.

In *Re Burton*, *Banks* v. *Heaven*, *supra*, Chitty, J., came to the contrary conclusion. In that case the property consisted partly of realty and partly of personalty; and the learned judge held that, on the true construction of the will, there was a contingent right to the income of the personalty; and, while distinguishing the case from *Re Jeffery*, *Burt* v. *Arnold*, *supra*, he expressed disapproval of the above-stated doctrine.

In *Re Adams*, *A.* v. *A.*, 1893, 1 Ch. 329, North, J., while adhering to his decision in *Re Jeffery*, held that, so long as none

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of the children had attained a vested interest, the income could be applied for the maintenance of all. This, as above mentioned, seems on any hypothesis to be a reasonable deduction from the language of the Act.

In *Re Holford, H.* v. *H.*, 1894, 3 Ch. 30, in the C. A., the difficulty was solved by holding that the child who first attains twenty-one, does not acquire any vested interest in the whole fund, but only in an aliquot share; and therefore, that he has no right to more than his aliquot share of the subsequent income. It follows, that the others can subsequently be maintained out of the income of their contingent aliquot shares, and it makes no difference, if the class is liable to be increased. (*Re Jeffery, Arnold* v. *Burt*, 1895, 2 Ch. 577.)

In *Re Wells, W.* v. *W.*, 43 Ch. D. 281, an infant was entitled to the income of two funds for life, to the one absolutely, and to the other contingently. The trustees provided maintenance out of the blended income of both funds, without discriminating between them. The infant attained twenty-one, and thereupon the contingent life interest became absolutely vested; and the trustees no longer had any discretion to discriminate. It was held that the Court would now exercise the lapsed discretion on their behalf, and would do so in the way most beneficial to the infant, by considering the whole of the contingent life interest to have been expended in maintenance.

As to the evidence of proper application of maintenance money, see *Re Evans, Welch* v. *Channell*, 26 Ch. D. 58.

The trustees must exercise the discretion given to them as to granting maintenance, and must not blindly pay over income to a guardian as such. See *Wilson* v. *Turner*, 22 Ch. D. 521. It would be proper that trustees should require from the guardian at least the outline of a scheme for maintenance and education. *A fortiori*, where trustees are empowered to pay the whole or any part of the capital to a parent or guardian, they must not hand over any capital without a proper exercise of their discretion. (*Dunning* v. *E. of Gainsborough*, W. N. 1885, p. 110; 54 L. J. Ch. 991.)

If trustees, in the *bonâ fide* exercise of their discretion, refuse to make any allowance for maintenance because they do not consider it necessary, the Court will not interfere to overrule their discretion. (*Re Bryant*, 1894, 1 Ch. 324.)

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the

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same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

In *Re Buckley*, 22 Ch. D. 583, which was decided under the corresponding section of Lord Cranworth's Act, it was held that the direction to accumulate the residue of the income for the benefit of the person who *ultimately becomes entitled to* the property, does not apply to accumulations of income arising out of an absolute gift liable to be defeated by death under twenty-one years.

Accumulations of income may under this section be applied for past maintenance. (*Per* Chitty, J., *Re Pitts' Settmt., Collins* v. *Pitts*, W. N. 1884, pp. 225, 242.)

The words in sub-s. (1), "either for life, or for any greater interest," are newly added in this Act. A corresponding addition was required in the present sub-section, which has not been made; with the result that in the case of an infant tenant for life the accumulations would go, upon a literal construction, not to the infant himself, but to the "person who *ultimately becomes entitled to the property*" from which they arise, such person being not the tenant for life alone, but the tenant for life for his life and the remainderman after his death. (*Re Bowlby*, 1904, 2 Ch. 685, at p. 710.) In the case of a gift to a tenant for life which either expressly (*Re Wells*, 43 Ch. D. 281) or by implication (*Re Humphreys, H.* v. *Levett*, 1893, 3 Ch. 1) vested immediately, such an interpretation of the section would have affected the construction of wills contrary to the intention of the Act, and was accordingly rejected. But reading together the language of sub-sects. (1) and (2), it becomes apparent that the suggestion of North, J., in *Re Wells, W.* v. *W.*, 43 Ch. D. 281, at p. 286, that perhaps in the latter sub-sections the word "property" might not mean capital exclusively, attributes to the Act an intolerable degree of looseness in the use of language. In *Re Humphreys, H.* v. *Levett*, 1893, 3 Ch. 1, the difficulty was got over, perhaps in the best way, by holding that the gift of an immediate life interest by a testator contained by implication a declaration that sub-s. (2) should not apply to the construction of his will, and that the sub-section was accordingly excluded by sub-s. (3). The criticism is obvious, that what is only implied cannot properly be said to be "expressed"; and it is noteworthy that the learned judges did not describe the precise manner in which the exclusion was supposed to be effected. But the decision, as supplying an obvious want, would probably be sustained.

The question has, however, been carefully considered by the Court of Appeal in *Re Bowlby*, 1904, 2 Ch. 685, and it is now decided that "property" in sub-s. (2) means the property the income arising from which has been accumulated, so that if the contingent legacy is settled the tenant for life is, on the

happening of the contingency, entitled only to the interest during his life of the amount of the surplus income and the accumulations thereof, that amount forming an accretion to the original legacy. The decision in *Re Scott*, 1902, 1 Ch. 918, to the contrary, was accordingly overruled.

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(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

A direction that the intermediate income shall be accumulated is not such an expression of a "contrary intention" as to prevent the trustees from applying it for maintenance under this section. (*Re Thatcher*, 26 Ch. D. 426.)

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

X.—Rentcharges and other Annual Sums.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

Sect. 44. Remedies for recovery of annual sums charged on land.

On the jurisdiction of the Court, apart from this enactment, see *Hambro* v. *H.*, 1894, 2 Ch. 564.

If the annuity is charged upon the corpus of lands, not only upon the income, the Court has jurisdiction, apart from this enactment, to sell or mortgage in order to raise arrears. (*Re Tucker, T.* v. *T.*, 1893, 2 Ch. 323.)

Where a rentcharge is secured by a term of years, the owner is not entitled to have arrears raised by a sale of the

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inheritance; his remedy is confined to having the arrears raised by means of the term. (*Blackburne* v. *Hope-Edwardes*, 1901, 1 Ch. 419.)

By 18 & 19 Vict. c. 15, s. 12, all life annuities or rentcharges granted otherwise than by marriage settlement (or by will, see s. 14) are void as against purchasers, &c., unless registered.

The words of the present sub-section, "or out of the income of any land," seem to include the case of an annuity secured upon a rent incident to a reversion; for such annuity is not incident to a reversion. But the section clearly has no application to rent reserved upon a lease or an attempted lease. (*Lewis* v. *Baker*, 1905, 1 Ch. 46.)

It sometimes, though not often, happens that a legal rentcharge is vested in an infant by a settlement. In such cases the rentcharge should be declared to be payable to the trustees during the infancy, and they will then be able to exercise the statutory powers conferred by this section.

Rent is divided by Littleton (s. 213) into *rent service*, *rentcharge*, and *rent seck*.

Rent service includes rent incident to tenure, commonly called chief rent or quit rent, and rent incident to a reversion; and it may be distrained for by the common law. This is the proper meaning of the phrase, "fee farm rent"; though it is now often used to mean a rentcharge in fee simple created by way of consideration on the sale of lands at the present day: it being in some parts of the country a common practice to sell lands in consideration of such a rentcharge instead of a lump sum. Rent granted in consideration of the enfranchisement of copyholds, by virtue of 6 & 7 Vict. c. 23, s. 2, is thereby expressly declared to be rent service, and to be parcel of and appendant and appurtenant to the manor of which the enfranchised copyholds were parcel. Only the king has had power since *Quia Emptores* (18 Edw. 1) to reserve a rent incident to tenure; *i.e.*, to tenure, as distinguished from and unaccompanied by any reversion, which is tenure in fee simple. (Fitzh. N. B. 210 C.) But the reservation of a rent upon a conveyance in fee will be construed as creating a rent, *i.e.*, a rentcharge or rent seck. (*Per curiam*, *Newcomb* v. *Harvey*, Carth. 161, at p. 162.) As to the reservation of chief rents before the statute, see Litt. sect. 216. Rentcharge is a rent issuing out of land, which is not incident to the tenure or to the reversion upon any estate of the person liable to pay it, but is made distrainable by express contract ("by force of the writing only, and not of common right." Litt. sect. 217). Rent seck was a rent similar to the latter, but not distrainable (*ibid.*); and might arise (1) by the grant of a rentcharge unaccompanied by a power of distress; (2) by the severance of a rent service from the tenure, or the reversion, to which it was incident; or (3) by the release of a power of distress which once existed. (Shep. T. 253.)

A rent granted for equality of partition among coparceners

is distrainable at common law, without any express power of distress. (Finch, Law, p. 156.)

Rents seck were made distrainable by 4 Geo. 2, c. 28, s. 5, which is still in force.

The effect of the last-mentioned Act, and of the present section, is, that rents are now most obviously, in reference to the essential distinctions between them, divisible into (1) chief rents; (2) rentcharges; and (3) rents incident to a reversion.

A rentcharge may be granted out of a term of years. (Co. Litt. 147 b.) It is a chattel interest. (1 Prest. Abstr. 358.)

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

Of course it is necessary, in order that a distress may be lawful, that the title of the terre-tenant shall be subject to the title to the rentcharge. (*Cannon* v. *Turner*, 1 Roll. Abr. 669, pl. 32, 33.)

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

It is conceived that the owner of a rentcharge granted by a tenant in fee simple, has power under this sub-section to expel from actual possession a tenant for years holding under a demise subsequent to the rentcharge. This power is a remedy

C. A. 1881, Sect. 44.

which "might have been conferred by the instrument under which the annual sum arises"; see sub-s. (1), *supra;* and the fact that by s. 2, sub-s. (iii.), *ante*, "possession includes receipt of income," does not prevent it from also including possession. But the remedy will probably be exercised by giving such tenant notice to pay over his rent.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

This enactment was doubtless intended to supersede the necessity for the creation of terms of years to secure jointure rentcharges in settlements, and the insertion of powers, in favour of future tenants for life, to limit terms to secure future jointures. But there is this distinction between the two cases: that in settlements a life estate is never limited, except to persons already in being; and, therefore, no difficulty can arise, with respect to any use limited by them, under the law relating to perpetuities. But when a provision of this nature is made applicable to rentcharges generally, the question of remoteness arises. In the case of a rentcharge limited in fee simple, the question arises whether, since the terms to be created under this section are interests in the nature of uses to arise upon a contingency, which contingency is not such as must necessarily happen within the time limited by the rule against perpetuities, the power is not simply void. By virtue of sub-s. (1), *supra*, the power will have no greater validity than it would have had if it had been conferred by the instrument creating

the rentcharge. But the contrary seems to be assumed, in S. L. Act, 1890, s. 9, p. 355, *post*, with regard to the rentcharges there referred to.

C. A. 1881, Sect. 44.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

It must be remembered that rentcharges created by appointment might be held to date from the creation of the power, not from its exercise. The Act cannot be safely relied upon where the instrument creating the power was executed before the commencement of the Act.

With regard to annuities charged upon income, the question often arises, whether, on a deficiency in some years, it can be made good out of a subsequent surplus; as to which see *Stelfox* v. *Sugden*, Johns. 234; *Birch* v. *Sherrat*, L. R. 2 Ch. 644.

Sect. 45. Redemption of quit rents and other perpetual charges.

45.—(1.) Where there is a quit rent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the *Copyhold Commissioners* shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

For the division of rents, see note on s. 44, sub-s. (1), *ante*.

The Copyhold Commissioners were merged in the Land Commissioners for England, constituted by S. L. Act, 1882; see s. 48 of that Act, p. 309, *post*. The functions of the Land Commissioners for England have now been transferred to the Board of Agriculture, constituted by the Board of Agriculture Act, 1889, 52 & 53 Vict. c. 30.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or

C. A. 1881, Sect. 45.

tender to that person the amount certified by the *Commissioners*.

This section seems not to apply where the person entitled is under any disability. Coverture is not for this purpose a disability in the case of women married after the 31st December, 1882, or, so far as regards "rents" held by a subsequently accruing title, in the case of women married before that date. (See the M. W. P. Act, 1882, sects. 2, 5, *post*.)

If a rent in fee simple should be included in a settlement, the question may arise whether the tenant for life is a person "empowered to dispose thereof absolutely" within the meaning of this sub-section. Though he has power to sell the rentcharge, he is not the person to whom a payment or tender of the purchase-money should be made. (See S. L. Act, 1882, s. 22, p. 263, *post*.)

(3.) On proof to the *Commissioners* that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

If, on the tender, acceptance is refused, the section does not expressly oblige the owner of the land, when the rent has been redeemed, to pay the "capital value" to the person formerly entitled to the rent; but this will probably be inferred from the general tenor.

The land will, of course, be discharged only in so far as the person to whom the tender is made was entitled to dispose of the rent. It cannot be supposed that the Board of Agriculture is to investigate and finally adjudicate upon the title.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the *Commissioners*.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

"Rent reserved on a sale" seems to mean a rentcharge created on occasion of a sale, in whole or part discharge of the consideration therefor; though such a creation is not properly styled a reservation. The only rent which admits in strictness

C. A. 1881, Sect. 45.

of being "reserved," is rent incident to a reversion; which can never be "perpetual," because no particular estate can be perpetual.

Rentcharges may lawfully be created upon a sale for full and *bonâ fide* valuable considerations of land to charitable uses. See 27 & 28 Vict. c. 13, s. 4; now repealed, and replaced by the Mortmain and Charitable Uses Act, 1888, s. 4, sub-s. (5).

(6.) This section applies to rents payable at or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

XI.—Powers of Attorney.

Sect. 46. Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Sections 8 and 9 of Conv. Act, 1882, and s. 23 of the Trustee Act, 1893, must be read in connection with this and the two following sections. The following is an outline of the salient points in these enactments:—

1. The present section permits execution in the name, &c., of the attorney.
2. Sect. 47, in all *bonâ fide* dealings, whether with or by attorneys, protects the person so dealing, although the power of attorney may, *without the knowledge* of such person, have been determined by the death, &c., of the principal.
3. Sect. 23 of the Trustee Act, 1893, protects a *trustee* acting or paying money in reliance upon a power of attorney, notwithstanding its previous revocation, unless the trustee had notice thereof.
4. Sect. 8 of the Conv. Act, 1882, validates *in favour of purchasers*, acts done under a power of attorney *given for valuable consideration*, and in the instrument creating it *expressed to be irrevocable*. This does not depend upon the absence of notice.

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5. Sect. 9 of the same Act validates *in favour of purchasers*, acts done under any power of attorney (not necessarily given for valuable consideration) which in the instrument creating it is expressed to be irrevocable *for a fixed specified time*, not exceeding one year from the date. This also does not depend upon the absence of notice.
6. Sect. 48 of the present Act permits powers of attorney to be deposited at the Central Office of the Supreme Court.

A power of attorney is, at common law, under ordinary circumstances, revocable at will, and is *ipso facto* revoked by the death of the principal. But a licence to do an act, lawful in itself, but which the licensee is by condition restrained from doing, as, for example, a licence to a lessee, restrained by condition from assigning, to assign, is not revoked by the death of the licensor. (Co. Litt. 52 b, *ad fin.*)

Bare authorities or powers cannot be delegated to an attorney, and an executor having authority to sell or lease cannot appoint an attorney for the purpose. Nor can an attorney himself act by an attorney; nor can a person enabled to do a thing only by special custom (as an infant to make a feoffment by the custom of gavelkind) do it by attorney. (See *Combe's Case*, 9 Rep. 75, at p. 76.)

An attorney may be appointed for a special purpose, such as to make or take livery of seisin (Co. Litt. 52 a); and generally a man can do by attorney what he can do in his own right. A copyholder may surrender or be admitted by attorney. A man may execute a deed by attorney, and may constitute an attorney with a general power to sell his lands and goods, or to sue *in omnibus causis motis et movendis*. (1 Salk. 96.) The same rules now extend to married women, so far as they are applicable. (See s. 40, and note thereon, p. 121, *ante*.)

Persons who for other purposes are disabled in law may commonly be attorneys for the purpose of delivering seisin on a feoffment. (Co. Litt. 52 a.)

The authority must be strictly pursued; and, therefore, one of two joint attorneys cannot act alone; and if one dies the power does not survive, nor can one act on the refusal of his co-attorney, nor can an authority given to three jointly or severally be executed by two jointly. (Co. Litt. 112 b, 113 a, 181 b.)

An authority to sell as attorney, does not include authority to pledge. (*Coondoo* v. *Watson*, 9 App. Cas. 561.)

Formerly, if an attorney acted in his own name, not expressing that he was acting as attorney, the act was void; and therefore if an attorney, having authority to execute leases, purported to make a lease in his own name, it was void. (9 Rep. 76 b, 77 a.) In *Frontin* v. *Small*, 2 Lord Raym. 1418; 1 Stra. 705, it was even held that a lease executed by an attorney in his own name, though expressed to be "for and in the name of" the principal, was void, and that no action on the covenants lay against the attorney. The present section alters the law in this respect. But the Courts had shown a tendency

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to modify their extreme rigour; and to hold that, so long as the act was done by the attorney substantially as the act of the principal, not as his own act, it was sufficient. In *Wilks* v. *Back*, 2 East, 142, the signature "For J. B. (*the principal*) M. W. (*the attorney*)," was held sufficient.

Before the enactment of this section a lease could be executed on behalf of a lunatic by the committee, using his own name and seal. (*Lawrie* v. *Lees*, 7 App. Cas. 19.)

A lease made by an *agent* of a lessor must be executed in the name of the lessor; otherwise the agent may be held personally liable, even though the instrument should be expressed to be made "for and on behalf of" the principal. (*Norton* v. *Herron*, 1 C. & P. 648; Ry. & M. 229; *Tanner* v. *Christian*, 4 E. & B. 591.) This seems still to be the law.

As regards copyholds, an attorney may surrender either in his own name or in the name of his principal. (Scriv. Cop. 4th ed. p. 128.)

The principal and not the attorney ought still to be named party to a deed executed under a power of attorney. And though, by virtue of the present section, the execution will be valid if the attorney should execute in his own name, this course would be inconvenient. The practice formerly in use ought to be continued. (See *Re Whitley, &c.*, 32 Ch. D. 337.)

As to the execution of deeds by attorneys on behalf of companies registered under the Companies Acts, see the Companies (Consolidation) Act, 1908, s. 78, which replaces the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 55.

Sect. 47.

Payment by [*qu.* or to] attorney under power without notice of death, &c., good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

See also the Trustee Act, 1893, s. 23, p. 408, *post*. The present section is not repealed, and perhaps refers only to persons acting in their own right.

The phrase, "*shall not be liable in respect of* the payment," seems to mean, that he shall not be liable to pay the money a second time, after having once paid it under such circumstances as, in the absence of the contingencies specified in this subsection, would have given him a good discharge.

(2.) But this section shall not affect any right

C. A. 1881, Sect. 47.

against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

The marginal note seems to be incomplete. The phrase "in pursuance of a power of attorney," which is copied with a slight variation from Lord St. Leonards' Act, 1859, 22 & 23 Vict. c. 35, s. 26, would naturally apply only to acts done by the attorney, not to the acts of persons dealing with him. But attorneys often receive money, while they comparatively seldom pay it. If payments made to attorneys should be held not to come within this section, its provisions will have little practical effect. The words were probably meant to include all dealings with, or by, an attorney, in reliance upon the validity of a power. This view is strengthened by the language of sub-s. (2).

The section extends the protection which by Lord St. Leonards' Act, s. 26, is given to trustees, executors, and administrators acting *bonâ fide* in pursuance of a power of attorney, so as to apply generally; and it provides for lunacy, unsoundness of mind, and bankruptcy, in addition to death and revocation; and in the saving clause (sub-s. (2)) it substitutes the rights of persons "interested in" for those of persons "entitled to" money paid.

By virtue of the present section, a purchaser is not now concerned, provided that there is a valid contract binding upon the vendor and his estate, to ascertain, before paying or parting with the final control over his purchase-money, that the vendor survived the date of the execution of a conveyance which he has executed by attorney, unless the conveyance is intended to pass a legal estate. If the conveyance comprises only an equitable estate, or such an interest as a share of residue, a valid receipt for the purchase-money is all that is essential to the purchaser's title. But the purchaser cannot pay, if he has actual notice that the vendor did not survive. By Conv. Act, 1882, sects. 8 and 9, p. 195, *post*, the power may, in the instrument creating it, be expressed to be irrevocable, either absolutely (if given for valuable consideration) or for a fixed time not exceeding a year (whether given for value or not); in which case a purchaser seems not to be prejudicially affected even by actual notice that the vendor did not so survive, or by actual notice of any other fact which would otherwise have revoked the power.

In the case of these irrevocable powers, it would seem that, after the death of the vendor, a conveyance executed by the attorney would be valid in equity, independently of the question

C. A. 1881, Sect. 47.

whether it was preceded by a valid contract binding upon the vendor and his estate; and the exceedingly strong language of s. 8, sub-sects. (i.) and (ii.), and s. 9, sub-sects. (i.) and (ii.), of Conv. Act, 1882, suggests the conclusion, that such a conveyance would even avail to pass a legal estate. But that conclusion would involve grave inconveniences, and in the absence of judicial decision, it could not in practice be relied upon.

Sect. 48. Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court [of Judicature].

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

The deposit of a document purporting to be a power of attorney at the Central Office of course gives it no validity or authenticity which it would not otherwise have had; and office copies will only prove (1) the fact that a certain document was deposited; (2) the fact that it contained such and such matters.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the [Commissioners of Her Majesty's] Treasury, the fees to be taken therein.

The words in square brackets in sub-ss. (1) and (5) are repealed by the Statute Law Revision Act, 1898.

(6.) This section applies to instruments creating

C. A. 1881, Sect. 48.

powers of attorney executed either before or after the commencement of this Act.

The practice of filing instruments under this section has become common.

For the only rule hitherto made under this section, see App. I., *post*.

XII.—Construction and Effect of Deeds and other Instruments.

Sect. 49. Use of word "grant" unnecessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this Act.

Operative words in deeds are in modern times construed liberally, so as to give effect to the intention of the parties as far as possible. "*Benigne faciendæ sunt interpretationes chartarum, propter simplicitatem laicorum, ut res magis valeat quàm pereat. Verba intentioni et non e contra debent inservire.* Deeds intended, and made, to operate one way, may operate another way, if the intention of the parties cannot take place unless they operate a different way from what they were intended. Judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intention of the parties. More consideration is to be had for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it." (1 Prest. Conv. 182, citing the judgment of the Court of C. P. in *Roe* v. *Tranmarr*, Willes, 682, at p. 684.) The cases are collected in the notes to *Chester* v. *Willan*, 2 Wms. Saund. 96.

Previously to the passing of this Act the word "grant" was not necessary to pass things lying in grant (*Shove* v. *Pincke*, 5 T. R. 124, 310; *Haggerston* v. *Hanbury*, 5 B. & C. 101); and now, by the 8 & 9 Vict. c. 106, s. 2, all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery. The word "grant" will still be appropriate, where it is intended to imply covenants declared by statute to be implied by its use. (See the Lands Clauses Act, 1845, 8 Vict. c. 18, s. 132.)

The word "grant" (*concessi*) was always one of the largest and most beneficial to the purchaser that could be used, and was suitable to every kind of assurance. (Co. Litt. 301 b.) The propriety of superseding it in practice by the word "convey" is very questionable.

C. A. 1881, Sect. 50.

Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

By the common law, husband and wife are regarded as only one person: and therefore no conveyance of property which was appropriate, as between other people, to convey *inter vivos*, could take effect from the husband to the wife. The wife could not convey to her husband, partly for the same reason, but also because, being under coverture, she could not convey at all. But the husband could declare a trust in his wife's favour; and therefore he could convey freeholds to her by conveyance operating under the Statute of Uses. And by the same artifice he could convey freeholds to himself jointly with any other person or persons. Also a wife could, in conjunction with her husband, be a party to an action; and therefore she could be a party to levying a fine or suffering a common recovery, where the rules as to parties were the same as in real actions. Such fine or recovery would bind the wife by estoppel; and therefore, in all cases where (as in claims to dower) an estoppel was equivalent to a conveyance, a married woman could, at common law, convey by this means. Such a fine, taking effect only by estoppel at common law, needed no assistance from the statutes of fines, and was therefore good without proclamations.

In the case of freeholds the present section obviates the necessity of conveying to a grantee to uses.

Lord St. Leonards' Act, 1859, 22 & 23 Vict. c. 35, s. 21, enables any person to assign personal property, by law assignable, including chattels real, directly to himself and another person or persons or corporation by the like means as he might assign the same to another; and the present section extends the ability to the case of *choses in action*.

But the present section does not enable a man to assign leaseholds to his wife, or a woman to assign leaseholds to her husband. It is not clear that the Married Women's Property Act, 1882, contains anything to enable such assignments to be made. The most natural construction of the words, "in the same manner as if she were a feme sole," occurring in s. 1, sub-s. (1) of that Act, p. 448, *post*, would be to prevent the marital right from attaching to property when it has been assigned, not to validate methods of assignment which would otherwise be invalid, unless, perhaps, where the method of holding would itself at common law affect the nature of the

C. A. 1881, Sect. 50.

conveyance; *e.g.*, if husband and wife hold as joint tenants, they might release *inter se*. But a doubt has been raised whether the common law doctrine of the identity of husband and wife has been superseded by that Act. (See *Re March, Mander* v. *Harris*, 24 Ch. D. 222.) The decision of Chitty, J., in that case was reversed on appeal 27 Ch. D. 166; but upon grounds which leave unaffected his observations upon the effect of the M. W. P. Act in relation to the *status* of coverture. In *Re Jupp, J.* v. *Buckwell*, 39 Ch. D. 148, Kay, J., dissented from the view above stated. It is submitted that the view of Kay, J., is the more correct, because the Act is silent as to status; and though the old common law doctrine of the wife's disability with regard to property is a deduction from the common law doctrine as to status, it does not follow that a removal of the disability will exercise any reflexive effect upon the status. In *Re Dixon, Byram* v. *Tull*, 42 Ch. D. 306, North, J., held that the particular will before him contained a sufficient indication of an intention that the husband and wife should take different shares; and he remarked that, before the Act, even a slight indication of such an intention had been allowed to take a case out of the general rule; and, without dissenting from the doctrine as to status laid down in *Re Jupp*, he criticised that case somewhat adversely, upon the ground that it seemed to have failed to give due weight to the established doctrine as to intention.

In *Ramsay* v. *Margrett*, 1894, 2 Q. B. 18, it was held that, since the M. W. P. Act, a husband may by bargain and sale vest chattels in his wife living in the same house. In *Re D. of Marlborough, Davis* v. *Whitehead*, 1894, 2 Ch. 133, it seems to have been assumed that a wife may assign leaseholds to her husband.

In *Dowager Duch. of Sutherland* v. *D. of Sutherland*, 1893, 3 Ch. 169, at p. 196, the question was referred to, but not decided, whether, under the S. L. Acts, a husband can grant a lease to his wife. But it has since been decided that such a lease may be valid. (*Gilbey* v. *Rush*, 1906, 1 Ch. 11.)

Sect. 51. Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

As to how far the word *heirs* was formally necessary in the

C. A. 1881, Sect. 51.

limitation of a fee simple, see Challis, R. P. 2nd ed. 194. As to how far it was necessary in the limitation of a fee tail, see *ibid.* 264. The rules governing the construction of legal limitations, relating to the necessity for formal words of limitation, are applicable also to equitable limitations in the nature of a trust executed. (*Meyler* v. *M.*, 11 L. R. Ir. 522; *Re Whiston's Settmt., Lovatt* v. *Williamson*, 1894, 1 Ch. 661; *In re Irwin, I.* v. *Parkes*, 1904, 2 Ch. 752. See also *E. of Mountcashell* v. *More-Smyth*, 1896, A. C. 158.) But there may be an exception when the fee is vested in trustees or the intention to confer an absolute interest is plain. (*Re Tringham, T.* v. *Greenhill*, 1904, 2 Ch. 487; *Re Oliver's Settlement, Evered* v. *Leigh*, 1905, 1 Ch. 191.)

Since this section refers only to *deeds*, it does not generally apply to customary assurances of copyholds.

The statutory words are, upon a strict construction, only applicable in substitution for the old word *heirs;* and therefore it is a question whether they may be used in substitution for the word *successors* in a limitation to a corporation sole.

It is conceived that the complete omission of all words of limitation in a deed would prevent "all the estate" of a grantor seised in fee simple, or fee tail, from passing by the conveyance under s. 63, sub-s. (1), p. 159, *post.* Otherwise this section would be purely nugatory. Moreover, s. 63 seems, like the "all the estate" clause, which it is intended to supersede, to refer not to defects in the words of limitation, but to defects in the "general words" and similar additional matter which, previously to the coming into operation of the present Act (see s. 6, *ante*), were usually appended to the parcels. It has never been contended that the "all the estate" clause would heal a defect in the words of limitation.

The words *fee simple* seem to mean here fee simple *absolute*, as in the Statute *Quia Emptores*, 18 Edw. 1, ch. 3. It is not clear whether the section was intended to apply to the limitation of modified fees. But fee simple "in his large sense" (Co. Litt. 19 a) includes all modified fees which are capable of subsisting at common law. The section probably applies to the limitation of a determinable fee; this being strictly in the nature of a modification superinduced upon a fee simple absolute, which might as well be superinduced upon it when limited in one way as in another. The same remark does not apply to conditional fees or to qualified fees simple. The section, of course, applies to base fees arising by express limitation.

A conveyance of land to a person "in fee," omitting the word "simple," will not pass the inheritance. (*Re Ethel and Mitchell's and Butler's Contract*, 1901, 1 Ch. 945.)

Sect. 52. Powers simply collateral.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

(2.) This section applies to powers created by

C. A. 1881, Sect. 52.

instruments coming into operation either before or after the commencement of this Act.

The following is an outline of the provisions relating to the survivorship, disclaimer, and release of powers, contained in the present Act, Conv. Act, 1882, and the Trustee Act, 1893:—

1. The Trustee Act, 1893, s. 22, p. 407, *post*, contemplates and permits the exercise of powers by *surviving trustees*.
2. Sect. 6 of Conv. Act, 1882, p. 191, *post*, contemplates and permits the exercise of powers by the *remaining* or *continuing donees*, after disclaimer of the powers by one or more of the original donees. This section makes no express mention of executors or trustees.
3. The present section contemplates and permits the total extinction of powers.

It seems to be inherent in the notion of a *disclaimer*, that it should only be capable of being executed by a person who has never intermeddled with or purported to exercise the powers which he disclaims. This remark does not apply to a release.

It seems clear that the words "by deed" govern "or contract" as well as "release"; so that a contract not under seal is not within this section.

Since the case of *Edwards* v. *Slater*, Hardr. 410; Tudor, L. C. R. P. 3rd ed. 368, a power coupled with an interest has been commonly styled "appendant" or "in gross," accordingly as the exercise of the power could, or could not, affect the interest with which it was coupled; and a power not coupled with any interest has been commonly styled "collateral." Before that case those terms were not used with precision or consistency. Nothing seems to be gained by adopting them, especially as they never possessed any peculiar appropriateness to the senses in which they were used. [The following independent opinion to the like effect, by an authority of the highest competence, deserves quotation:—"When the subject is closely looked into, it is difficult to obtain very clear ideas of the meaning of these several terms as applied to powers. Accordingly, all the writers who have treated of the subject, differ in some degree as to the classification." Chance, Powers, p. 9, s. 25.]

Before the coming into operation of the present Act, a power coupled with an interest could have been released by the donee, unless such release would be in violation of a duty to exercise the power or to keep it on foot.

A power not coupled with any interest could not be released.

A covenant not to exercise a power which the donee could release would, before the Act, have operated as a release.

There seems to be nothing in the Act to alter this last rule. It is also conceived that a "contract not to exercise" a power which could not be released but for this section, will take effect as a release.

For a remarkable example of the use to which this section

C. A. 1881, Sect. 52.

has been put, see *Shirley* v. *Fisher*, W. N. 1882, p. 128; 47 L. T. 109.

A father, tenant for life, may obtain a portion vested in a deceased child in default of appointment, by releasing the power to appoint. (*Re Radcliffe*, *R.* v. *Bewes*, 1892, 1 Ch. 227.) Before the Court will order the fund to be transferred to him, he must surrender his life interest. And see *In re Somes*, *Smith* v. *Somes*, 1896, 1 Ch. 250.

It is conceived that, notwithstanding coverture, a married woman may now release a power not coupled with an interest; and that her separate acknowledgment of the release is unnecessary. In former editions of this work it was stated that in the case of a power coupled with an interest, acknowledgment will still be necessary under the Fines and Recoveries Act, s. 77, as amended by Conv. Act, 1882, s. 7, p. 193, *post;* unless she was married subsequently to the commencement of the M. W. P. Act, 1882, or became donee of the power subsequently to that date. But it has since been decided that where by a settlement made on a woman's marriage in 1872, property is settled upon a married woman for her life for her separate use without power of anticipation, with remainder to her husband for life, and subject thereto upon trust for her issue as she and her husband should jointly appoint, the power can validly be released by the husband and wife by an unacknowledged deed. (*Re Chisholm's Settlement*, *Hemphill* v. *H.*, 1901, 2 Ch. 82.)

Where property is held upon trust for a woman married since 1882 for her life for her separate use, with remainder as she should appoint by will, and in default of appointment for her executors, administrators and assigns, she becomes absolutely entitled on releasing the power. (*Re Davenport*, *Turner* v. *King*, 1895, 1 Ch. 361.)

There is, perhaps, some doubt whether this section enables the donee of a power to release it in violation of a duty to preserve it. But the better interpretation seems to be, that the section only entitles the donee to release a power not coupled with an interest, to the same extent as before the Act he might have released a power coupled with an interest. It follows that trustees cannot release, and thereby extinguish, under this section, powers which are coupled with a duty (*Weller* v. *Ker*, L. R. 1 Sc. App. 11); though under Conv. Act, 1882, s. 6, p. 191, *post*, they may disclaim powers, and thereby leave the exercise of the powers to the remaining or continuing trustees. Where the power not only involves the exercise of a discretion, but is of a nature to imply a personal confidence in the particular individuals, such trustees can neither release, nor disclaim, the power. (*Re Eyre*, *E.* v. *E.*, W. N. 1883, p. 153; 49 L. T. 259; *Saul* v. *Pattinson*, W. N. 1886, p. 67; 34 W. R. 561.) It was held by Kay, J., 7th Aug., 1888, in *Re Child*, *C.* v. *Hayllar*, 1888, C. 2315, an originating summons in Chambers under Ord. LV., that a trustee cannot release any power involving the exercise of a discretion.

C. A. 1881, Sect. 52.

In *Re Rose*, 1904, 2 Ch. 348, Farwell, J., held that the capacity which the donee of a limited power of appointment has of releasing the power for his own benefit cannot be exercised by his trustee in bankruptcy for the benefit of his estate. The order was discharged by consent in the Court of Appeal without any opinion being expressed on this point (1905, 1 Ch. 94).

This section seems to add no validity to a bond or covenant by the donee of a testamentary power to exercise it in a particular way; as to which, see *Palmer* v. *Locke*, 15 Ch. D. 294.

On the distinction between a power properly so called, though only a bare power, and a mere authority, as a power of attorney, see Chance on Powers, sects. 1218, 2148.

As to the disclaimer of powers, and their survivorship after disclaimer, see Conv. Act, 1882, s. 6, p. 191, *post*.

As to the fraudulent, or corrupt, release of powers, see *Cunynghame* v. *Thurlow*, 1 Russ. & My. 436, n.; *Smith* v. *Houblon*, 26 Beav. 482. On the former case, see *Re Radcliffe*, *R.* v. *Bewes*, 1892, 1 Ch. 227. But in general, and in the absence of some specially fiduciary character in the nature of the power, the doctrines relating to frauds upon powers do not apply to releases. (*Re Somes*, *Smith* v. *Somes*, 1896, 1 Ch. 250.)

Powers conferred by S. L. Act, 1882, are incapable of assignment or release. See s. 50 of that Act, p. 311, *post*.

Sect. 53. Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

This enactment has had the effect of bringing into common use the practice of referring to deeds as supplemental; but it seems not to effect any change in the law. Reference to another deed as supplemental would previously have given constructive notice of the supplemental deed; and the enactment cannot give actual notice, where without it the notice would have been only constructive.

It is conceived that a recital implied in a supplemental deed would not be implied in a third deed expressed to be supplemental to the latter. Recitals in the principal deed become sub-recitals in the supplemental deed, and do not appear to be available as evidence under the V. & P. Act, 1874, s. 2, p. 2, *ante*, or under s. 3, sub-s. (3) of the present Act, p. 18, *ante*. In such cases, the third deed should be expressed to be supplemental to both.

C. A. 1881, Sect. 54.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

The receipt in the body of the deed at law operated as an absolute estoppel. (*Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704.)

In equity there was no estoppel; but the receipt was evidence of the payment until the payment was disproved, the alleged payee being at liberty to offer evidence in disproof. (*Wilson* v. *Keating*, 27 Beav. 121; and on appeal, 4 De G. & J. 588.)

The cases before *Wilson* v. *Keating* only show that the receipt might be impugned *for the purpose of letting in the vendor's lien for the unpaid purchase-money*. The judgments in *Wilson* v. *Keating* (see, in particular, Lord Romilly, M.R., 27 Beav. at p. 126), which carried the principle a good deal further, show that this case was decided under a misapprehension of the earlier cases. But there is little doubt that the ruling of *Wilson* v. *Keating* would be followed; to which the present section does not seem to oppose any obstacle.

The meaning of this section seems to be, that the receipt in the body of the deed shall, as evidence of payment in favour of the person alleged to have paid, have as sufficient an effect as such a receipt, together with the usual indorsed receipt, would previously have had. Since a discharge to the person paying, would equally be a discharge to his representatives, whether in title or personal, these also are equally within the benefit of the evidence.

Sect. 55.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

The absence of the usual indorsed receipt, or its presence in an unusual place, would formerly, under some circumstances, have given a purchaser constructive notice of the non-payment and would have deprived him of his equitable defence. (See *Kennedy* v. *Green*, 3 My. & K. 699.) It is conceived that this

C. A. 1881, Sect. 55.

will no longer be the case. It seems that "not having notice" means "not having actual notice," and that "sufficient evidence" means "conclusive evidence."

A mortgagor who has given a receipt, either in the deed or indorsed thereon, is by this section estopped from saying that he never received the money. (*Saunders* v. *Kent*, W. N. 1885, p. 147; *Bateman* v. *Hunt*, 1904, 2 K. B. 530; *Powell* v. *Browne*, 97 L. T. 854.) He would, even under the former law, have been estopped by the two receipts taken together. (*Bickerton* v. *Walker*, 31 Ch. D. 151, which overrules *Parker* v. *Clarke*, 30 Beav. 54; see also *French* v. *Hope*, 56 L. J. Ch. 363.) But the section contains nothing to estop him from alleging that he subsequently paid it off in whole or in part; and therefore it contains nothing to relieve the transferee of a mortgage from inquiring into the state of the accounts between the mortgagor and the transferor at the date of the transfer.

A building lease which merely purports to be granted in consideration of moneys expended by the lessee, does not contain a receipt within this section. (*Renner* v. *Tolley*, W. N. 1893, p. 90; 68 L. T. 815.)

A subsequent purchaser cannot rely upon a receipt, unless he was aware of its existence. (*Lloyd's Bank, Ltd.* v. *Bullock*, 1896, 2 Ch. 192.)

A statement in a transfer of mortgage made in the statutory form that the mortgage is transferred in consideration of £—— paid by A. to B. without any express receipt clause estops B. from showing as against a subsequent holder that he has not received the money. (*Rimmer* v. *Webster*, 1902, 2 Ch. 163.)

Sect. 56. Receipt in deed or indorsed, authority for payment to solicitor.

See also the Trustee Act, 1893, s. 17.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

"It may, I think, be considered as established that the possession of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an

C. A. 1881, Sect. 56.

authority to the solicitor of the vendor to receive the purchase-money." (*Per* Lord Chelmsford, *Viney* v. *Chaplin*, 2 De G. & J. 468, at p. 477; and see *Ex pte. Swinbanks*, 11 Ch. D. 525.)

This section is of great practical importance, because, on payment being made to a duly authorized agent of the vendor, the latter's claim and lien for the purchase-money is gone. The section validates the acts of a statutory agent of the vendor in this behalf, subject to certain conditions, viz.:—

(1.) The agent must be a solicitor. It is uncertain whether the want of a certificate would be a disqualification. (See *Sparling* v. *Brereton*, L. R. 2 Eq. 64.) It is still more uncertain what would be the consequence if the person making the payment had notice of the want.

(2.) He must produce a deed containing, or having indorsed on it, such receipt as in the section mentioned. The execution of the deed, and the signature of the receipt, must of course be authentic.

(3.) The section speaks only of "consideration *money* or other *consideration*," *i.e.*, the consideration, whether money or money's worth, is only authorized to be paid *in specie*. There is nothing to authorize the statutory agent to accept payment of money by cheque (as to the validity of which, see *Jones* v. *Arthur*, 8 Dowl. Pr. 442); and it is the general rule that payment by cheque cannot safely be accepted by an agent, though duly authorized to accept payment, without express authority from the principal. (*Blumberg* v. *Life Interests, &c. Corporation*, 1897, 1 Ch. 171; aff. on the facts only, 1898, 1 Ch. 27.) It was decided in *Coupe* v. *Collyer*, 62 L. T. 927, that payment by set-off is not a good payment within this section. But at a sale by auction, the auctioneer is justified in accepting payment of the deposit by cheque. (*Farrer* v. *Lacy*, 31 Ch. D. 42.) On tender in general, see the cases cited in note (D.), Coke's Rep. ed. 1826, vol. 3, p. 234; *Finch* v. *Boning*, 4 C. P. D. 143; *Scott* v. *Uxbridge and Rickmansworth Rway. Co.*, L. R. 1 C. P. 596.

(4.) It has been held by North, J., in *Day* v. *Woolwich, &c. Society*, 40 Ch. D. 491, where the solicitor was acting as solicitor for the person liable to pay, that he must also be shown to be acting as solicitor for the person entitled to receive the money; and that otherwise the person paying the money will do so at his own risk. See also *Re Hetling and Merton*, 1893, 3 Ch. 269. But in the absence of anything to suggest the contrary, it seems that the person paying the money may, and indeed, is bound to, assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge. This construction has received the approval of the Court. (*King* v. *Smith*, 1900, 2 Ch. 425, 432.)

The section applies where the person entitled to receive the money executed the deed under a fraudulent misrepresentation of his solicitor as to the nature of the document. (*King* v. *Smith*, 1900, 2 Ch. 425.)

C. A. 1881, Sect. 56.

This section does not enable a vendor to give any greater authority to a solicitor to receive the purchase-money than he might have given without it, but only enables such authority to be implied as might have been given expressly. Since trustee vendors could not properly authorize their solicitor to receive the purchase-money, their solicitor formerly could not receive it under this section. (*Re Bellamy and Met. Bd. of Works*, 24 Ch. D. 387.) But now, by the Trustee Act, 1893, s. 17, sub-s. (1), p. 399, *post*, it is lawful for trustees to permit a solicitor to receive trust moneys under this section. And by sub-s. (2), a trustee may appoint a banker or solicitor to be his agent to receive money payable under a policy of assurance.

One of several trustees cannot be authorized by the others to receive the purchase-money on behalf of all. (*Flower* v. *Met. Bd. of Works*, 27 Ch. D. 592.) Perhaps if one of the trustees is a solicitor, he might be appointed under the Trustee Act, 1893, s. 17, sub-s. (1), above referred to.

Sect. 57. Sufficiency of forms in Fourth Schedule.

57.—Deeds in the form of and using the expressions in the forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

This section seems to be superfluous. If the forms, interpreted in the light of the Act, are sufficient in themselves to effect their design, there is no obvious necessity to enact that they shall be sufficient; and if they are not sufficient in themselves, there seems to be nothing in this section to give them more validity than they would otherwise have. This may be illustrated by the note on Form (C.), s. 27, p. 108, *ante*. It is possible that a solicitor making use of the forms might be protected from liability, in case of a disaster arising from their use.

Sect. 58. Covenants to bind heirs, &c.

[*This marginal note properly relates to the next following section.*]

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this Act. C. A. 1881, Sect. 58.

Where a covenant is made with the owners and occupiers for the time being of land, the section gives the heirs and assigns of the owners the benefit of the covenant, though the heirs of the occupiers might have no interest. (*Forster* v. *Elvet Colliery Co.*, 1908, 1 K. B. 629; aff. *sub nom. Dyson* v. *Forster*, 1909, A. C. 98.)

It is probable that the only covenants referred to in this section are those which "run with the land." But the naming of the heir, as covenantee, never had any effect upon his right to the benefit of such covenants (*Lougher* v. *Williams*, 2 Lev. 92); unless as evidence that the covenant was intended to endure beyond the life of the particular person named as covenantee; which might be shown equally well by naming the executor; in which case the heir, not the executor, would take the benefit of the covenant. (*Ibid.*) The assigns likewise could sue upon such covenants, even at common law, although not named (Co. Litt. 385 a); at all events, in such cases as *The Prior's Case* (cited in *Spencer's Case*, 5 Rep. 16, at p. 17 a), where the benefit of the covenant runs with the land, and the covenantor is a stranger.

It is the better opinion that at the common law, in cases between lessor and lessee, the assign of the reversion could neither sue upon any covenant on the part of the lessee, nor be sued upon any covenant on the part of the lessor, contained in the lease; and there is no reason to suppose that the naming of the assign of the reversion in the covenant had any effect, either upon his right or upon his liability.

The naming of the assigns of the covenantee is often confused with the naming of the assigns of the covenantor; and the mode in which the latter ought to be named is often misunderstood. If the latter part of the first resolution and the second resolution in *Spencer's Case*, *supra*, may be relied upon, there is a distinction between cases in which a covenantor enters into a covenant *for himself and his assigns*, and cases in which the assigns are not mentioned. In the former cases only the covenant will run with the land if it relates to something which, though not then parcel of the thing demised, will become such parcel on performance of the covenant.

It is, perhaps, uncertain whether the mention of the assigns is necessary for the purpose (see *Williams* v. *Earle*, L. R. 3 Q. B. at p. 749), but it is undoubtedly the proper course in practice to mention them.

The same rules are applicable to the executors, administrators and assigns of the covenantee, in the case of a covenant made for the benefit of a leasehold reversion, as are applicable to the heirs and assigns of the covenantee, in the case of a covenant made for the benefit of a reversion of inheritance.

59.—(1.) A covenant and a contract under seal, and a bond or obligation under seal, though not Sect. 59. Covenants to

C. A. 1881, Sect. 59.

extend to heirs, &c.

[*This marginal note properly relates to the last preceding section.*]

expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

This section only facilitates the *remedy*, without enlarging the *rights*, of the specialty creditor by bond or covenant.

By the common law, real estate descending to the heir by inheritance was not liable for simple contract debts of the ancestor; nor was it liable even for specialty debts unless in the deed creating the specialty the heirs were expressed to be bound. (Shep. T. 369.) If the heir was so expressed to be bound, he was bound in respect of all lands descending to him from the ancestor in fee simple; but not, after the statute *De Donis*, in respect of lands descending in fee tail, because, though these latter descended by inheritance, the power of the owner *post prolem suscitatam*, to charge lands held for a conditional fee, was taken away by the statute. Estates *pur autre vie* do not descend to the heir by inheritance, but only go to him (when he is properly named in the grant) as special occupant; and they were not, until after the Statute of Frauds, liable even for specialty debts, by which the heir was bound in respect of lands descending to him in fee simple. (*Doe* v. *Luxton*, 6 T. R. 289, at p. 291.) Copyholds were similarly not liable, until the 3 & 4 Will. 4, c. 104. (1 Scriv. Cop. 4th ed. p. 48.)

The claim of the specialty creditor was liable at common law to be defeated by a devise of the realty. The Statute of Fraudulent Devises, 3 & 4 Will. & M. c. 14, gave bond creditors an action of debt against the devisee, not being a devisee for the payment of debts. This Act, having been made perpetual by 6 &7 Will. 3, c. 14, was repealed, but substantially re-enacted and extended to covenants, by 11 Geo. 4 & 1 Will. 4, c. 47.

The Statute of Frauds, s. 12, amended by the 14 Geo. 2, c. 20, made estates *pur autre vie* devisable; and enacted that, if not devised, they should be chargeable in the hands of the heir as assets by descent, as in the case of lands in fee simple; and in default of a special occupant, should go to the personal representatives and be assets in their hands. These enactments

C. A. 1881, Sect. 59.

were repealed by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 2, but substantially re-enacted by sects. 3 and 6.

The distinction between specialty and simple contract debts was abolished in respect of debts contracted by any person being at the time of his death a *trader*, by 47 Geo. 3, c. 74; the provisions of which Act were repealed, but amended and re-enacted by the Act 11 Geo. 4 & 1 Will. 4, c. 47, above referred to. These provisions, having been superseded by those of 32 & 33 Vict. c. 46, hereinafter mentioned, are now repealed.

The 3 & 4 Will. 4, c. 104, made all freehold, customaryhold, and copyhold estates, assets to be administered in courts of equity for the payment of simple contract as well as of specialty debts; but with priority in favour of specialty creditors. This priority was abolished by 32 & 33 Vict. c. 46, s. 1; which enacted that, in the administration of the estate of every person dying after the 1st January, 1870, no debt of such person shall be entitled to priority by reason that it is a specialty debt, but that all the creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets, whether such assets are legal or equitable. But the creditor by simple contract, and the creditor by any specialty in which the heirs were not named, had no right of action directly against the heir or devisee, and could enforce their claim only by means of an administration suit in equity; or, after the coming into operation of the Judicature Acts, an administration action. The last-mentioned class of creditors will now, in the absence of special provision to the contrary in the deeds under which they claim, be able to sue directly. Creditors by simple contract must still take proceedings for administration; as to which, see R. S. C. 1883, Ord. LV.

It is possible that the phrase "contract under seal," which seems in this section to be somehow distinguished from "covenant," was meant to include stipulations in deeds which do not actually use the word "covenant," such as provisoes for redemption, agreements, declarations, and the like. This intention seems to have more point in s. 60, *post*, where the phrase also occurs, than in the present section. But it is conceived that the "contracts" in question are in fact covenants. The old phrase, "Provided always, and it is hereby agreed and declared," was probably derived from a confusion between the ancient mortgages upon *condition*, and the more modern mortgages subject to a *contract for re-conveyance* upon redemption. Since the coming into operation of the present Act, a practice has sprung up in some quarters of cutting the phrase short at "Provided always;"—*i.e.*, shortening it by omitting its most essential feature, the words which directly import a contract. But the words, "provided always," though they are not properly so used, may by themselves imply a covenant. (Prest. Shep. T. 122, 123.)

It was decided in *Spyer* v. *Hyatt*, 20 Beav. 621, that a

C. A. 1881, Sect. 59.

widow's dower had priority over her husband's simple contract debts; apparently upon the ground that whatever was included in the wife's dower was not in truth a part of the husband's real estate descending to the heir. If this decision is correct, it seems to apply to specialty debts as well as to simple contract debts; and there seems to be nothing in 32 & 33 Vict. c. 46, s. 1, to affect the decision; which was approved in *Jones* v. *Jones*, 4 K. & J. 361, at p. 366. A distinction appears to be drawn in the construction of the Dower Act, 3 & 4 Will. 4, c. 105, s. 5, between a debt to which land is specifically made liable by a charge or contract, and a debt to which land is circuitously made liable by reason of the operation of 3 & 4 Will. 4, c. 104; and this reasoning does not seem to be affected by the subsequent passing of 32 & 33 Vict. c. 46. Of course, if the husband has by his will charged his debts upon his real estate, they will take priority over the dower. (*Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466; *Lacey* v. *Hill*, L. R. 19 Eq. 346.)

Sect. 60.
Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

This section does not apply to all covenants made with covenantees jointly, but only to cases in which the covenantees, besides being the persons entitled to sue upon the covenant, are also the persons *to or for whose benefit* the act is to be done. It seems to render unnecessary the insertion of "the survivors or survivor of them, their or his assigns, or the heirs, executors, or administrators of such survivor," and similar expressions, to denote the persons other than those originally specified, who

may *require* a stipulation to be performed, when such persons are also the persons who may *sue the person liable* to perform it, if he should make default.

C. A. 1881, Sect. 60.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

Sect. 61. Effect of advance on joint account, &c.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

Before this enactment, a joint debt belonged at law to the survivors or survivor of several mortgagees, but the presumption in equity was that money advanced by several persons was owned by them for several interests, and, in the absence of a declaration to the contrary, the survivors alone could not give a receipt. It was therefore necessary in mortgages to trustees to state on the face of the deed that the advance was made out of money belonging to the lenders on a joint account "in equity as well as at law." The words "in equity as well as at law" may now be omitted; but the advance may still appropriately be expressed to be made out of, or as, money belonging to the lenders on a joint account. The provision at

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the end of sub-s. (1) allows a mortgagor, or obligor, to disregard notice of a severance of the joint account. As to the effect of payment to one alone, see *Powell* v. *Brodhurst*, 1901, 2 Ch. 160.

Sect. 62. Grants of easements, &c., by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

Easements might always be created *de novo* by express grant, and the whole doctrine (see note on s. 6, p. 33, *ante*) of implied grant by the use of general words rests upon this fact. Even a covenant would operate as a grant in favour of the covenantee. (*Holmes* v. *Seller*, 3 Lev. 305; *Shove* v. *Pincke*, 5 T. R. 124, at p. 129.)

It is the most essential characteristic of an easement, that it is enjoyed in respect of the ownership of a dominant tenement over or in respect of a servient tenement. Easements are not incorporeal hereditaments, but appurtenant rights. A right which would be an easement if it were enjoyed in respect of a dominant tenement, is, if there be no such tenement to which it can be appurtenant, a right which, unless it is coupled with an interest in the land over which it is enjoyed, is no more than a mere licence. A mere licence is revocable at will, and is a personal right which is incapable of assignment; though, until revoked, it would justify a trespass, and such revocation must be upon reasonable notice. (*Mellor* v. *Watkins*, L. R. 9 Q. B. 400; *Aldin* v. *Latimer*, 1894, 2 Ch. 437.) A licence which is coupled with the grant of an interest in the land to which it refers, is not revocable, if and in so far as such revocation would defeat the grant of the interest. (See *Wood* v. *Leadbitter*, 13 M. & W. 838, at p. 845.) And when a licence is revocable, an action for damages will lie for breach of a contract not to revoke it. (*Kerrison* v. *Smith*, 1897, 2 Q. B. 445.)

Garden rights are of common occurrence in London. They are usually provided for by the insertion of a common clause, drawn in the form of a grant, in all the leases of the neighbouring houses. Such forms would perhaps have more certain

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efficacy, if accompanied by a covenant not to revoke the licence contained in the grant, and to do nothing to interfere with the use of the land in accordance with the licence.

It was probably not intended by this section to permit the creation of any right which could not formerly have been created, but only to provide a more convenient method of creation. Formerly, an easement could be created by way of direct grant, and now it can also be created by way of use. This enables limited owners, taking under a settlement effected by conveyance to uses, to grant easements under a power. So far, this enactment is now superseded by s. 20, sub-s. (1), of S. L. Act, 1882, p. 249, *post*, except in regard to powers conferred by the settlement which may be in excess of those conferred by the last-mentioned Act. And it enables a vendor expressly to retain a right of way created *de novo*, without the purchaser executing the conveyance.

The section does not alter or extend the incidents of a right or licence; and a right which was formerly revocable or incapable of transmission or assignment will now, it is conceived, have no larger capabilities than it had before. It is difficult to suppose that special privileges are in future to be conceded, if a right happens to be created by way of use, and refused, if it happens to be created by way of grant.

As to statutory rights not appurtenant to any tenement, which have sometimes improperly been called easements, see note on the S. L. Act, 1882, s. 2, sub-s. (10), (i.), p. 219, *post*.

Sect. 63. Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

The intention of this section was doubtless to supersede the necessity for inserting the "All the estate" clause; and its effect will doubtless be restricted to the effect, if any, which the clause had when inserted. The clause would not, even at law, pass any estate, right, or interest, not expressly conveyed and not appearing by the context to have been intended to

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pass. (*Hunt* v. *Remnant*, 9 Exch. 635; *Rooper* v. *Harrison*, 2 K. & J. 86, at p. 113.) The clause is now generally omitted in practice.

See *Thellusson* v. *Liddard*, 1900, 2 Ch. 635, for a case where an equitable interest was held to pass by virtue of this section.

Sect. 64. Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females as the case may require.

XIII.—Long Terms.

Sect. 65. Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

As to the power given by the Trustee Act, 1888, s. 9, now repealed, and replaced by the Trustee Act, 1893, s. 5, sub-s. (1), (a), to invest trust moneys upon mortgages of long terms, see p. 381, *post*.

Sect. 11 of Conv. Act, 1882, p. 199, *post*, enacts that the present section shall be deemed not to have included (i.) any term liable to be determined by re-entry for condition broken; or (ii.) any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

Rent incident to the reversion on a term of years is not capable of becoming "barred by lapse of time" during the continuance of the term. (*Grant* v. *Ellis*, 9 M. & W. 113; *Irish*

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Land Commission v. *Grant*, 10 App. Ca. at p. 26.) Consequently, however long the rent may have been unpaid, the land cannot be offered for sale free from rent in the absence of a special condition stating the circumstances from which a release from the rent is to be presumed. (*Blaiberg* v. *Keeves*, 1906, 2 Ch. 175.) In *Doe* v. *Prosser*, Cowp. 217, length of time was held to afford sufficient presumption of an *ouster* by one tenant in common of another; but there can be no ouster of the reversioner by a termor for years, who is estopped from denying the reversioner's title. Such ouster, if made possible by 3 & 4 Will. 4, c. 27, s. 9, applies only in the case of rents not less than twenty shillings a year, and is effected, not by mere non-payment, but by payment to an adverse claimant of the reversion. And though in *Eldridge* v. *Knott*, Cowp. 214, Lord Mansfield said (p. 215), that "There are many cases not within the Statute [of Limitations] where from a principle of quieting possession, the Court has thought that a jury should presume anything to support a length of possession;" the phrase, "a length of possession," seems hardly appropriate to describe "a length of time during which a rent has not been paid." In the last-cited case the rent was a quit rent, which is within the Statute of Limitations, not a rent incident to a reversion, which is not.

The reversions contemplated by this section have in some cases a substantial value, which the termor is now enabled to appropriate without compensation.

The mere fact that a rent is so small that it is not actually demanded and is not saleable, will not make it a "rent having no money value" within the meaning of this enactment. (*Re Smith and Stott*, 29 Ch. D. 1009, n.; 31 W. R. 411.) But the reservation of a nominal rent, such as a silver penny, expressed to be payable "if lawfully demanded" (upon which words stress was laid by the Court), will not exclude the section; such a reservation being presumed to have been intended to have no money value, but only to be evidence of a tenancy. (*Re Chapman and Hobbs*, 29 Ch. D. 1007.)

It is possible that the remarkable provision in s. 15 of Lord Cranworth's Act (see note on s. 21, *ante*) was intended to effect, in many cases, the same purpose as the present section, by enabling any mortgagee possessed of a long term, which had been created by an owner in fee simple, to convey the fee simple upon a sale effected under the power of sale conferred by that Act.

It is believed that some practitioners combine a declaration enlarging a long term with a conveyance; and it has been stated that when this is done, the Commissioners of Inland Revenue require a ten-shilling stamp to be fixed in addition to the *ad valorem* duty in respect of the conveyance. (See 27 Sol. Journ. 465.) It is conceived that the declaration and the conveyance are clearly "several distinct matters," within the meaning of the Stamp Act, 1870, s. 8, sub-s. (1). (See *Hadgett* v. *Commrs. of Inl. Rev.*, 3 Ex. D. 46.) But the impropriety of

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combining them in one deed is obvious; and the validity of such a conveyance is open to grave doubt. The whole deed takes effect *uno flatu*, and if the conveyance should take effect, it is impossible to see how "the person in whom the term was vested," could *acquire* and *have* in the land a fee simple instead of the term. See sub-s. (3), *infra*, and note thereon.

(2.) Each of the following persons (namely) :

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land, to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

The language of this sub-section includes three cases :—(1) a legal owner beneficially entitled; (2) a legal owner entitled as trustee; (3) a legal owner entitled as personal representative of a deceased owner. An equitable owner, the term being vested in trustees, is clearly not within its language, since he is entitled in right of the trust, not in right of the term; and there is no necessity to suppose that his case is within the Act's intention, since a sufficient meaning can otherwise be assigned to all the language used.

The fact that, by s. 2, sub-s. (iii.), p. 12, *ante*, possession includes receipt of income, seems to have little bearing upon the question. It might enable an equitable owner to be included, in cases where the language is otherwise appropriate; but hardly in a case where the language is inappropriate and there is no

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necessity for including him. The receipt of income by a legal owner gives a sufficient meaning to the language used.

Moreover, since the trustee, "being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale," would clearly have power to enlarge the term, it follows, upon the hypothesis that the *cestui que trust* for the time being entitled to the income in right of the trust, also has power to enlarge, that there would exist at the same time two independent persons, each separately having the power. This would be anomalous and inconvenient; and gives a look of improbability to the hypothesis upon which it rests.

It will therefore be prudent not to assume that an equitable owner, whether tenant for life or otherwise, has power to enlarge the term. A legal tenant for life clearly has the power.

A legal tenant for life of a term, with a quasi-remainder over, can be created by will (*Mat. Manning's Case*, 8 Rep. 94; *Lampet's Case*, 10 Rep. 46), though not by deed. (See also *Wilkinson* v. *South*, 7 T. R. 555.) The quasi-remainder is an executory devise. Settlements of long terms, like settlements of other terms of years, are usually effected by trusts.

The mortgagor of a long term, when the mortgage is by demise, seems to have power to enlarge the term, whether he is or is not "mortgagor in possession;" because, even though possession should be taken by the mortgagee under the demise, this would not deprive the mortgagor of his title under the term itself.

When the mortgage is by assignment, the mortgagor seems to have power to enlarge only, at the most, while in possession; for, when out of possession, he is not "beneficially entitled in right of the term."

A mortgagee by demise, and a mortgagee by assignment not in possession, clearly have no power to enlarge. Whether a mortgagee by assignment in possession has the power is a difficult question. The answer seems to depend upon whether he is "beneficially entitled" within the meaning of sub-s. (2), (i.). If he is not, certainly no one else is; so that, upon that supposition, the beneficial title would be in abeyance. But it would not be prudent, in the absence of judicial decision, to accept a title depending upon an enlargement effected by such mortgagee.

It is apprehended that an ineffectual attempt to enlarge a term under this section would be a mere nullity, and would not operate a forfeiture of the term. Now that, by 8 & 9 Vict. c. 106, s. 4, the tortious operation of feoffments is abolished, there seems to be no conveyance *in pais* by which a forfeiture can be incurred. See on this subject, 4 Bac. Abr. 884, *Leases and Terms of Years*, T. 2.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was

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previously vested shall acquire and have in the land a fee simple instead of the term.

It is (at the least) very doubtful whether the fee simple, into which the term is enlarged, can be conveyed, or settled, by the deed effecting the enlargement. The Act contains nothing to warrant such a proceeding, and it must not be assumed that the Courts will make the necessary additions.

Since there cannot be two fees simple in the same land, it seems that the estate of the reversioner is absolutely destroyed. It cannot be transferred to the termor, because such transfer would operate as a merger, not an enlargement. The only alternative is to suppose that the reversion in fee simple continues in existence, and that the fee simple created by enlargement subsists as a base fee. (Upon this question, see Challis, R. P. 2nd ed. 305.)

It is clear, from the language of this sub-section, that the equitable owner of a term cannot acquire more than an equitable fee simple by the enlargement.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

This sub-section apparently enables many burdens to be imposed at law upon a fee simple, which have hitherto been possible only in equity and with notice, under the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774. A long term can be created, to the intent that it shall be enlarged into a fee simple by the termor. And there is nothing to restrict the covenants here mentioned to negative covenants, to which the principle of *Tulk* v. *Moxhay* is restricted. (*Haywood* v. *Brunswick, &c. Bdg. Socy.*, 8 Q. B. D. 403.)

The question might be raised, whether the burden of covenants annexed to a fee simple acquired by enlargement, endures only so long as the term would have endured if it had not been enlarged, or during the continuance of the fee simple. Since the new fee simple is in fact the old term (the latter being enlarged, not merged) it would seem that the covenants remain annexed to the term under its new shape, and therefore, if otherwise valid, endure for ever.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and,

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at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

If chattels, or any chattel interest, be settled, either directly upon trusts resembling the limitations in a strict settlement of lands, or indirectly by reference to such limitations, the first quasi-tenant in tail of the chattels, or the first tenant in tail of the lands by reference to which the chattels are settled, who attains an indefeasibly vested interest or estate, becomes absolutely entitled to the chattels. (*Foley* v. *Burnell*, 4 Bro. P. C. 319; *Vaughan* v. *Burslem*, 3 Bro. C. C. 101; *Carr* v. *Ld. Erroll*, 14 Ves. 478.) Lord Romilly, M.R., held, in *Hogg* v. *Jones*, 32 Beav. 45, that if the estate of the tenant in tail is liable to be devested by the coming *in esse* of a tenant in tail of an elder branch, the chattels will not vest in him during the contingency; so that, if he dies pending the contingency, no claim to the chattels can pass to his personal representative. But Kay, J., though he did not deny that the last-cited case was rightly decided, seems to have thought that it ought to have been decided upon the particular wording of the will out of which it arose; and he held, in *Parkin* v. *Cresswell*, 24 Ch. D. 102, that the chattels, pending the contingency, will vest for a transmissible interest in such a tenant in tail, so that, if the estate tail should eventually become indefeasibly vested, the claim of the personal representative to the chattels will become absolute.

The addition of the words, "so far as the rules of law and equity will permit," has no effect to prevent the absolute vesting of the chattels in a tenant in tail or quasi-tenant in tail, in whom they would otherwise have vested absolutely. (*Rowland* v. *Morgan*, 2 Ph. 764, where the opinion of Lord Hardwicke to the contrary, expressed in *Ld. Deerhurst* v. *D. of St. Albans*, 5 Madd. 232, and *Gower* v. *Grosvenor*, 5 Madd. 337, was thought to have been clearly overruled. See also *Harrington* v. *H.*, L. R. 5 H. L. 87, at p. 107.)

The absolute vesting of the chattels in manner above mentioned can be postponed or prevented by a clear expression of intention; but such expression of intention must comply, in point of clearness and certainty, with the rules which govern conditions subsequent at common law, of which clearness and

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certainty were prominent characteristics; and, therefore, if the contingency upon which the vesting depends is of so peculiar a nature that it is impossible, during a period of time, to say whether the contingency has happened or not, the restriction will be void. (*Re Viscl. Exmouth*, 23 Ch. D. 158.)

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

XIV.—Adoption of Act.

Sect. 66. Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or

other powers, covenants, provisions, stipulations, or words is improper. C. A. 1881, Sect. 66.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

The several distinctions appearing in the language of the first sub-section must be carefully noted. It speaks of—

(a) *Powers* given to a *person;*

(b) *Covenants*, *provisions*, *stipulations* and *words* to be deemed *included* or *implied* in an *instrument;*

(c) Covenants, provisions, stipulations and words *made applicable* to a *contract for sale* or *other transaction.*

The section is therefore confined to powers, and to covenants, &c., either "deemed included or implied" in instruments, or made applicable to transactions. Under special circumstances, it may, notwithstanding this section, be a breach of duty on the part of a solicitor to omit to exclude the operation of s. 17, p. 74, *ante* (on the consolidation of mortgages); and to such cases the present section does not seem to apply. The rule as to consolidation is a new rule of law, which may be negatived if circumstances render it prudent so to do. The *omission to negative* the rule cannot aptly be styled "a provision applicable to a transaction;" still less (if possible) is it a "covenant," or a "stipulation," or a "word."

XV.—Miscellaneous.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing. Sect. 67. Regulations respecting notice.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be

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served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the Court.

The notices required or authorized by the Act are mentioned in sects. 14, 20, and 45, *ante*.

Apart from this section, a mortgagee's notice may be affixed to the door of a vacant house. (Fisher on Mortgages, 4th ed. par. 756, 5th ed. par. 955; Coote on Mortgages, 4th ed. p. 249, 5th ed. p. 274.)

Sect. 68. Short title of 5 & 6 Will. 4, c. 62.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.

This short title was also inserted in the Schedule to the Short Titles Act, 1892; but is omitted from the Act of 1896.

XVI.—Court; Procedure; Orders.

Sect. 69. Regulations respecting payments into Court and applications.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers. C. A. 1881, Sect. 69.

Applications for relief under Conv. Act, 1881, s. 14, must be by action. See note, at p. 67, *ante*.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly. 39 & 40 Vict. c. 59, s. 17.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine ; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Sub-s. (3) is not merely permissive. (See *Re Lillwall's Settmt. Trust*, W. N. 1882, p. 6.) But it is only directory, and the penalty for bringing a matter before the Court in any other way affects the question of costs only. (*Ex pte. Thompson*, 28 Sol. Journ. 274.) This point is not noticed in the report in W. N. 1884, p. 28 ; and see *Re Blundell*, 1901, 2 Ch. 221.

Sects. 5, 9, 24, 25, sub-s. (3), and 42, *ante*, provide for applications which come under this sub-section.

C. A. 1881, Sect. 70.

Orders of Court conclusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

40 & 41 Vict. c. 18, s. 40.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

The words "under any statutory or other jurisdiction" seem to mean "*purporting to be* under," &c. An order will not be invalidated as against a purchaser, although it shows on its face that it was made *ultra vires*. (*Re Hall Dare*, 21 Ch. D. 41; *Mostyn* v. *M.*, 1893, 3 Ch. 376.)

But an order will not by virtue of this section be taken to bind any estate or interest which, having regard to the terms of the order and the proceedings in and circumstances under which it was made, was not intended to be bound. (*Jones* v. *Barnett*, 1899, 1 Ch. 611; affirmed, 1900, 1 Ch. 370.) The section was only intended to cure irregularities in procedure; it was not intended to enable the Court to sell the property of B. when it supposed it was ordering the property of A. to be sold. (*S. C.* 1900, 1 Ch. 374, 375.)

For a case where a good title was held to have been made out under this section coupled with a special condition, see *Re Whitham*, *Whitham* v. *Davies*, W. N. 1901, p. 86. See also *Re Harrowby and Paine*, W. N. 1902, p. 137.

But "the Court" means the High Court; see s. 2, sub-s. (xviii.), *ante*; and in cases where a County Court acts in excess of its jurisdiction in making an order, the title derived under such order cannot be forced on an unwilling purchaser. (*Re Bowling and Welby*, 1895, 1 Ch. 663.) It is conceived that the above principle gives the *ratio decidendi* of that case.

C. A. 1881, Sect. 70.

Orders were improperly made in the Leeds County Court, under sects. 199 and 203 of the Comp. Act, 1862; and it is probable (though not so stated) that the jurisdiction was derived under the Comp. (Winding-up) Act, 1890, s. 1, sub-s. (1); which, though it gives jurisdiction to wind up, does not substitute the County Court for the High Court within the meaning of the present enactment.

It seems that, under the Settled Estates Act, 1856, 19 & 20 Vict. c. 120, s. 28, a purchaser, after the execution of a conveyance pursuant to an order of the Court, would have obtained an indefeasible title, notwithstanding that the Court had exceeded its jurisdiction in making the order. (*Re Thompson, Green* v. *Thompson*, Johns. 418.)

It is conceived that the Court, relying upon the general principles of its jurisdiction, would not permit a purchaser to avail himself of an order obtained by fraud, of which he had notice at the time of the purchase.

It is possible that the Court, upon similar grounds, would not, in spite of the sweeping language of sub-s. (1), permit a purchaser to avail himself of an order obtained by fraud, even though he had no notice thereof, to obtain anything further, by means of the order, which he had not at the time, after he had received notice of the fraud, or the obtaining of which would involve such notice. The aim of the section may be to place upon a legal basis, and to extend the doctrine of equity, that no relief in equity could be obtained as against a purchaser for value without notice, to purchasers with notice, so far as the cases here contemplated are concerned. But the latest authorities lay it down that, under this principle, even a purchaser for value without notice could not take advantage of the fraud of another person, though committed without his privity, to obtain any further benefit *in fieri*. (*Eyre* v. *Burmester*, 10 H. L. C. 90; *Heath* v. *Crealock*, L. R. 10 Ch. 22.) But if the matter was no longer *in fieri*, but actually completed, he might retain all that he had got, notwithstanding that, in order to make out his title, he had to rely upon deeds which were (by no fault of his) unknown to him at the date of his purchase, and which, if known, would have disclosed the fraud. (*Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.)

With reference to the equitable defence of purchase for value without notice, it must be remembered that this no longer affords a defence against a claim for discovery. (*Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300.) Nor against a claim to recover title deeds. (*Re Cooper, C.* v. *Vesey*, 20 Ch. D. 611; *Manners* v. *Mew*, 29 Ch. D. 725; *Re Ingham, Jones* v. *Ingham*, 1893, 1 Ch. 352.)

On the protection afforded to a puisne mortgagee by getting in the legal estate from the first mortgagee, see *Taylor* v. *Russell*, 1892, A. C. 244.

C. A. 1881, Sect. 71.

XVII.—Repeals.

Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

The rights and powers conferred by Lord Cranworth's Act will not be deemed to be extinguished, so far as concerns instruments coming into operation between the passing of that Act and the coming into operation of the present Act. (*Re Solomon & Meagher*, 40 Ch. D. 508.) Consequently a clause in the will of a testator who died in 1877 incorporating the provisions of Lord Cranworth's Act as to the appointment of new trustees is not affected by the present Act. (*Re Boucherett, Barne* v. *Erskine*, 1908, 1 Ch. 180.) This conclusion, however, does not apply to those sections, such as s. 43, *ante*, which are expressly extended to instruments coming into operation before the commencement of the Act; see *Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331, at pp. 338, 340.

XVIII.—Ireland.

Sect. 72.

Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court [of Justice] in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court [of Judicature] in Ireland shall be substituted for the central office of the Supreme Court [of Judicature]. C. A. 1881, Sect. 72.

The words in square brackets in sub-ss. (2) and (4) are repealed by the Statute Law Revision Act, 1898.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act. 40 & 41 Vict. c. 57, s. 69.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation. Sect. 73. Death of bare trustee intestate, &c. 37 & 38 Vict. c. 78.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE. Sched. 1.

ACTS AFFECTED.

PART I. (*a*).

1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

(*a*) The clause to which Part I. of this schedule was intended to refer does not appear in the Act. It is now included in Conv. Act, 1882, s. 2, *post*.

C. A. 1881, Sched. 1.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits"; and to make other provisions for the abolition of unnecessary oaths.

Sched. 2

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35. in part.	An Act to further amend the law of property and to relieve trustees ... Sections four to nine.	in part; namely,—
23 & 24 Vict. c. 126. in part.	The Common Law Procedure Act, 1860 ... Section two.	in part; namely,—

PART II.

15 & 16 Vict. c. 86. in part.	An Act to amend the practice and course of proceeding in the High Court of Chancery ... Section forty-eight.	in part; namely,

PART III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property.	
23 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills ... Parts II. and III. (sections eleven to thirty).	in part; namely,—

C. A. 1881, Sched. 3.

THE THIRD SCHEDULE.

Statutory Mortgage.

Part I.

Deed of Statutory Mortgage.

This Indenture made by way of statutory mortgage the day of 1882 between A. of [&c.] of the one part and M. of [&c.] of the other part Witnesseth that in consideration of the sum of £ now paid to A. by M. of which sum A. hereby acknowledges the receipt A. as mortgagor and as beneficial owner hereby conveys to M. All that [&c.] To hold to and to the use of M. in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum (*b*).

In witness &c.

*** Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.

Part II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

This Indenture made by way of statutory transfer of mortgage the day of 1883 between M. of [&c.] of the one part and T. of [&c.] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] Witnesseth that in consideration of the sum of £ now paid to M. by T. being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum M. hereby acknowledges the receipt M. as mortgagee hereby conveys and transfers to T. the benefits of the said mortgage (*c*).

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

This Indenture made by way of statutory transfer of mortgage the day of 1883 between A. of [&c.] of the first part B. of [&c.] of the second part and C. of [&c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] Witnesseth that in consideration of the sum of £ now paid to A. by C. being the mortgage money due in respect of the said mortgage no interest being now due and

(*b*) The words *as mortgagor* imply the covenants mentioned in s. 26, *ante*. The words *as beneficial owner* imply those mentioned in s. 7, sub-s. (1), (C) and (D), *ante*.

(*c*) For the meaning of the word *supplemental*, see s. 53, *ante*. This form will not pass the legal estate if the mortgage was executed before 1882. (*Re Beachey, Heaton* v. *Beachey*, 1904, 1 Ch. 67.)

C. A. 1881, Sched. 3.

payable thereon of which sum A. hereby acknowledges the receipt A. as mortgagee with the concurrence of B. who joins herein as covenantor hereby conveys and transfers to C. the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between A. of [&c.] of the 1st part B. of [&c.] of the 2nd part and C. of [&c.] of the 3rd part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS B. is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to A. by C. of which sum A. hereby acknowledges the receipt and B. hereby acknowledges the payment and receipt as aforesaid* A. as mortgagee hereby conveys and transfers to C. the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration A. as mortgagee and according to his estate and by direction of B. hereby conveys and B. as beneficial owner hereby conveys and confirms to C. All that [&c.] To hold to and to the use of C. in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in consideration of the further sum of £ now paid by C. to B. of which sum B. hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together] (*d*).

*** Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between C. of [&c.] of the one part and B. of [&c.] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [&c.]

(*d*) Upon the omission from form (C.) of the words *as mortgagor*, see note on s. 27, p. 108, *ante*.

C. A. 1881, Sched. 3.

WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest C. hereby acknowledges the receipt C. as mortgagee hereby conveys to B. all the lands and hereditaments now vested in C. under the said indenture To hold to and to the use of B. in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

*** Variations as noted above.

THE FOURTH SCHEDULE.

Sched. 4.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between A. of [&c.] of the one part and B. of [&c.] and C. of [&c.] of the other part WITNESSETH that in consideration of the sum of £ paid to A. by B. and C. out of money belonging to them on a joint account of which sum A. hereby acknowledges the receipt A. hereby covenants with B. and C. to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to B. and C. interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration A. as beneficial owner hereby conveys to B. and C. All that [&c.] To hold to and to the use of B. and C. in fee simple subject to the proviso for redemption following (namely) that if A. or any person claiming under him shall on the day of 1882 pay to B. and C. the sum of £ and interest thereon at the rate aforesaid then B. and C. or the persons claiming under them will at the request and cost of A. or the persons claiming under him re-convey the premises to A. or the persons claiming under him AND A. hereby covenants with B. as follows [*here add covenant as to fire insurance or other special covenant required.*]

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [&c.] WITNESSETH that in consideration of the further sum of £ paid to A. by B. and C. out of money belonging to them on a

C. A. 1881, Sched. 4.

joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to B. and C. of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness, &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between A. of [&c.] of the 1st part B. of [&c.] and C. of [&c.] of the 2nd part and M. of [&c.] of the 3rd part WHEREAS by an indenture dated [&c.] and made between [&c.] the lands hereinafter mentioned were conveyed by A. to B. and C. in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [&c.] and made between the same parties those lands were charged by A. with the payment to B. and C. of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as B. and C. hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of A. to B. and C. and of the sum of £ paid to A. those two sums making together the total sum of £ paid by M. for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ B. and C. hereby acknowledge the receipt and of which total sum of £ A. hereby acknowledges the payment and receipt in manner before mentioned B. and C. as mortgagees and by the direction of A. as beneficial owner hereby convey and A. as beneficial owner hereby conveys and confirms to M. All that [&c.] To hold to and to the use of M. in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add if required* And A. hereby acknowledges the right of M. to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to.
To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between John M. of [&c.] of the 1st part Jane S. of [&c.] of the 2nd part and X. of [&c.] and Y. of [&c.] of the 3rd part WITNESSETH that in consideration of the intended marriage between John M. and Jane S. John M. as settlor hereby conveys to X. and Y. All that [&c.] To hold to X. and Y. in fee simple to the use of John M. in fee simple until the marriage and after the marriage to the use of John M. during his life without impeachment of

waste with remainder after his death to the use that Jane S. if she survives him may receive during the rest of her life a yearly jointure rent-charge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rent-charge to the use of X. and Y. for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of John M. and Jane S. successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of John M. and Jane S. in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of John M. in fee simple [*Insert trusts of term of five hundred years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness &c.

THE CONVEYANCING ACT, 1882.

(45 & 46 Vict. c. 39.)

An Act for further improving the Practice of Conveyancing; and for other purposes.

[10th August, 1882.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Sect. 1. Short titles; commencement; extent; interpretation. 44 & 45 Vict. c. 41.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881), and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

The abbreviated short title of the Act of 1881 is not authorized to be used outside the limits of the present Act.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

(4.) In this Act and the schedule thereto—

(i.) Propert includes real and personal property, and any debt, and any thing in action, and

any other right or interest in the nature of property, whether in possession, or not; C. A. 1882, Sect. 1.

The definition of "property" varies from that which is given in the interpretation clause (s. 2, sub-s. i.) of Conv. Act, 1881, p. 10, *ante*. The words "and any estate or interest in any property, real or personal," are omitted, and the words "any other right or interest in the nature of property whether in possession or not" are substituted for the words "any other right or interest."

The word "property" occurs only in the sub-sub-section next following, and in s. 12, p. 199, *post*.

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

Compare Conv. Act, 1881, s. 2, sub-s. (viii.), p. 14, *ante*.

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act. 3 & 4 Will. 4, c. 74. 4 & 5 Will. 4, c. 92.

Searches.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or Sect. 2. Official negative and other certificates of searches for judgments, Crown debts, &c.

C. A. 1882, Sect. 2.

by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

The Central Office was established, and the business of registration referred to in the above-cited enactments was transferred thereto, by the Supreme Court of Judicature (Officers) Act, 1879, 42 & 43 Vict. c. 78.

By the Rules of the Supreme Court, 1883, Order LXI., r. 23 (No. 916), re-enacting the former Rules of the Supreme Court, Order LXA. r. 8a, it is provided as follows:—

"The Clerk of Enrolments, and each of the following registrars, namely—(*a*) The Registrar of Bills of Sale; "(*b*) The Registrar of Certificates of Acknowledgments of "Deeds by Married Women; (*c*) The Registrar of Judgments; shall, on a request in writing giving sufficient "particulars, and on payment of the prescribed fee, "cause a search to be made in the registers or indexes "under his custody, and issue a certificate of the result "of the search."

This section does not apply to searches in the registries of register counties, or to searches for judgments of the Court of Common Pleas of the County of Lancaster. As to inrolments, see sub-s. (11), *infra*.

The following list will show the sections of the scheduled Acts which are principally referred to:—

(1) 1 & 2 Vict. c. 110, ss. 11, 13, 18, 19, 22.
(2) 2 & 3 Vict. c. 11, ss. 4, 5, 7.
(3) 18 & 19 Vict. c. 15, ss. 4—7, 11, 12.
(4) 22 & 23 Vict. c. 35 (Lord St. Leonards' Act, 1859), s. 11 (Release of part of land charged not to affect validity of judgment as to remaining part), and s. 22 (Provisions as to re-registration to apply to Crown debts).
(5) 23 & 24 Vict. c. 38 (Lord St. Leonards' Act, 1860), ss. 1—5.
(6) 23 & 24 Vict. c. 115, both sections.
(7) 27 & 28 Vict. c. 112, ss. 3, 4.
(8) 28 & 29 Vict. c. 104, ss. 48, 49.
(9) 31 & 32 Vict. c. 54, ss. 1—3.

The charges with which these enactments deal, comprise judgments (including orders of courts), Crown debts, lis pendens, rent-charges under the Improvement of Land Act, 1864, annuities, and writs of execution and extent.

The law as to searches in general, is conveniently summarized in Prideaux, Conv. Prec. 15th ed. vol. I., pp. 128—158. See also Dart, V. & P. Ch. XI.

The registration of writs and orders affecting land, under the foregoing Acts, will probably be superseded in future by the Land Charges, &c., Act, 1888, s. 5, sub-s. (4); see note, *infra*.

As to searches in the Office of Land Registry, pursuant to the Land Charges, &c., Act, 1888, see s. 17 of that Act, p. 500, *post*. This Act gravely affects the operation of the above-mentioned enactments, so far as writs and orders affecting land

C. A. 1882, Sect. 2.

are concerned. By s. 17 of the same Act, the provisions of the present section are, with some modifications, extended to searches made under that Act.

By s. 1 of the Land Charges Act, 1900 (*post*, p. 501), the business of the Registrar of Judgments, hitherto conducted in the Central Office, shall be conducted in the Office of Land Registry. And by s. 2, a judgment or recognizance, whether obtained or entered into before or after the commencement of the Act, shall not operate as a charge on land unless and until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges, &c., Act, 1888.

The effect of this will be that, after the Act comes into operation, instead of making searches for judgments in the Central Office, a search must be made for writs and orders in the Land Registry.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

See the definition of "purchaser," s. 1, sub-s. (4), (ii.), p. 181, *ante*.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

It is difficult to say what is meant by the phrase "for the purposes of this section." No "purposes" are explicitly specified; and those matters which might be conjectured to be "purposes," such as, for example, the substitution of a vicarious

C. A. 1882, Sect. 2.

for a personal search, or the making official certificates to be conclusive evidence, do not give any sense to the passage in which the phrase occurs. The form of application officially prescribed (see Form II., p. 536, *post*) seems to assume that the purposes of this section are sales, mortgages, leases, and the like.

(5.) General Rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the [Commissioners of Her Majesty's] Treasury, the fees to be taken therein; which Rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, [and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act].

39 & 40 Vict. c. 59.

44 & 45 Vict. c. 68.

The words in square brackets are repealed by the Statute Law Revision Act, 1898.

For rules and forms under this section, see App. I., *post*.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

As to the liability of a solicitor who neglects to make proper searches, see Dart, V. & P. Ch. XI. sect. 2.

(9.) Where the solicitor is acting for trustees,

executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable. C. A. 1882, Sect. 2.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory rule. 3 & 4 Will. 4, c. 74.

This exception will also extend to deeds inrolled under the Acts relating to charities, 9 Geo. 2, c. 36, 24 & 25 Vict. c. 9, and 35 & 36 Vict. c. 24, s. 13; which are now superseded by the Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42. The exception also extends to awards under the Inclosure Acts, and to deeds inrolled under S. L. Act, 1882, s. 16. It probably will be held to extend also to bargains and sales inrolled under the 27 Hen. 8, c. 16; though these are not properly *deeds*, but only sealed and indented *memoranda*.

(12.) This section does not extend to Ireland.

Notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless— Sect. 3. Restriction on constructive notice.

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

"Purchaser" includes a mortgagee and a lessee. (See s. 1, sub-s. (4), (ii.), p. 181, *ante*, and *Hunt* v. *Luck*, 1902, 1 Ch. 428, 433.)

It is conceived that the effect of this section will be rather to define than greatly to alter the existing law. The section does not throw upon the purchaser the duty of inquiring from the tenant of the property to whom he pays his rent. (*Hunt* v. *Luck*, *ubi supra*.)

In *Ware* v. *Ld. Egmont*, 4 De G. M. & G. 460, at p. 473, Lord Cranworth says: "The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." The section practically leaves the law as it was on this point before the passing of the Act. Consequently on the sale of a lease containing unusual and onerous covenants, if the vendor does not give the purchaser express notice, he must, in order to affect him with notice of them, show that he gave a fair

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opportunity of ascertaining the terms of the lease in such circumstances that the purchaser ought reasonably to have done so. (*Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; and see *Re White and Smith's Contract*, 1896, 1 Ch. 637; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666; and as to freeholds, *Hone* v. *Gakstatter*, 53 Sol. Jour, 286.)

A purchaser is not affected with constructive notice of that which no possible inquiries or inspection would have brought to his knowledge. (*Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231.)

Constructive notice has been defined as knowledge which the Court imputes to a person upon a presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. (*Hewitt* v. *Loosemore*, 9 Ha. 449, at p. 455. See further, as to constructive notice, *Kettlewell* v. *Watson*, 21 Ch. D. 685, and cases there cited; the decision in which case was reversed on appeal, 26 Ch. D. 501; but upon the facts, and not upon any question of law. See also the discussion of the restrictions to which the general doctrine is subject, in *Engl. and Sc. Merc. Investm. Co.* v. *Brunton*, 1892, 2 Q. B. 700.)

A purchaser who does not investigate the title is affected with notice of what he would have learned by investigation, as such neglect tends to promote fraud (*Worthington* v. *Morgan*, 16 Sim. 547); and in cases of fraud, wilful neglect will render a purchaser liable to the consequences of presumed notice, even though there be direct evidence that he had not notice in fact. And he is affected with notice even if his abstention from inquiry is due to waiver under a contract. (*Wilson* v. *Hart*, L. R. 1 Ch. 463; *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391. But such a purchaser is not affected by notice of matters which he could not have learned without inquiring into the truth of recitals contained in the documents of title, or otherwise going behind the documents themselves. (*Dunning* v. *E. of Gainsborough*, W. N. 1885, p. 110; 54 L. J. Ch. 991.) And it would seem that a lessee, dealing with a tenant for life under the S. L. Acts, is not bound to inquire whether there are any trustees for the purposes of the Acts, and is not fixed with constructive notice that there are no such trustees. (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382; and see *Re Handman and Wilcox*, 1902, 1 Ch. 599.)

Knowledge that the vendor bought from a mortgagee, combined with circumstances tending to show that he bought at an undervalue, will not alone suffice to affect a purchaser with notice that the power of sale was improperly exercised by the mortgagee. (*Bailey* v. *Barnes*, 1894, 1 Ch. 25.)

The fact that a mortgagee was the solicitor of the mortgagor does not amount to constructive notice of all the relations that may exist between the mortgagee and mortgagor, and consequently an assignee of the mortgage may rely on the terms of the mortgage, including the receipt clause. (*Powell* v. *Browne*, 97 L. T. 854.)

A purchaser for value without notice is not hindered from availing himself of the legal estate to protect himself, by the

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fact that a fraud of which he was ignorant appears upon the title, if his ignorance of the title was not due to his own laches. Under such circumstances there seems to be no constructive notice of things appearing upon the title. (*Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.)

A puisne incumbrancer cannot, after receiving notice of a prior puisne incumbrance, obtain priority by getting in the legal estate from a bare trustee. (*Harpham* v. *Shacklock*, 19 Ch. D. 207.) But he may obtain from the legal mortgagee, whose mortgage comprises other lands, a voluntary conveyance of the legal estate in the lands comprised in the puisne mortgage. (*Taylor* v. *Russell*, 1892, A. C. 244.)

The section will not discharge a purchaser from the effect of such notice as is implied by possession or tenancy of land, or possession of title deeds. (See *Hunt* v. *Luck*, 1902, 1 Ch. 428.)

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

The words, "in the same transaction," which are founded upon the doctrine expounded by Lord Hardwicke in *Worsley* v. *E. of Scarborough*, 3 Atk. 392, are emphatic.

For some observations by Lord Herschell, L.C., throwing light on what is meant by "as such," see 1895, A. C. at p. 501.

For a very recent application of this sub-section, see *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231. Under the sub-section a purchaser or mortgagee is taken to have notice of whatever he might have ascertained from inquiry of the vendor or mortgagor. (*Re Alms Corn Charity, Charity Commrs.* v. *Bode*, 1901, 2 Ch. 50.)

In general, notice to a solicitor is notice to his client only when the notice was given after and during the retainer. But if the same solicitor is acting both for a vendor and a purchaser, or a mortgagor and a mortgagee, things coming to his knowledge after and during his retainer by either party, though prior to his retainer by the other, were formerly held to be notice to both parties. (*Fuller* v. *Benett*, 2 Ha. 394.) The present section modifies the law in this respect. (See *Re Cousins*, 31 C. D. 671, at pp. 676, 677.)

Notice to the solicitor is ordinarily notice to the client, although the information is not in fact communicated to the latter; but this rule does not extend to matters as to which there is an antecedent presumption that they would not be

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communicated by the solicitor, as, for example, the solicitor's own fraud. (See *Ex. pte. Oriental Comm. Bk.*, L. R. 5 Ch. 358; *Waldy* v. *Gray*, L. R. 20 Eq. 238; *Bateman* v. *Hunt*, 1904, 2 K. B. 530.) And, of course, no notice will be presumed when the circumstances are not such as to impose on the solicitor any duty to make the communication. (*Kettlewell* v. *Watson*, 21 Ch. D. 685; reversed on appeal, 26 Ch. D. 501, on the facts only, not upon any question of law.) But if the fraud is of such a nature that it would have been discovered by an independent solicitor employed by the client, then the mere fact that the solicitor, who was cognizant of the fraud, was the author of it, will not prevent the client from being fixed with constructive notice. (*Kennedy* v. *Green*, 3 My. & K. 693, see p. 720.)

In *Saffron Walden Bdg. Soc.* v. *Rayner*, 14 Ch. D. 406, the Court of Appeal strongly discountenanced the view, that there is such a thing as a permanent office of solicitor, or that a solicitor, who happens to be in the habit of acting for a person, is his agent so as to bind him by receiving notices or information. (See also *Tate* v. *Hyslop*, 15 Q. B. D. 368, at p. 374.) No doubt, a solicitor can be actually invested with such authority; but this must be expressly done. Therefore notice of a puisne incumbrance to a solicitor who usually acts for a first mortgagee, will not of itself prevent such first mortgagee from tacking subsequent advances.

By S. L. Act, 1882, s. 45, p. 305, *post* (modified by S. L. Act, 1884, s. 5), it is provided that a tenant for life exercising the statutory powers shall give notice to the trustees, and also to "the solicitor to the trustees," if any such solicitor is known to him; but this seems to be only a measure of general precaution, and not to constitute such a solicitor the trustee's agent for the purpose of receiving notice.

See further, as to notice to solicitors, &c., *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Rolland* v. *Hart*, L. R. 6 Ch. 678; *Banco de Lima* v. *Anglo-Peruvian Bank*, 8 Ch. D. 160; *Cave* v. *Cave*, 15 Ch. D. 639; Coote on Mortgages, 4th ed. p. 783; 5th ed. p. 852; Fisher on Mortgages, 3rd ed. par. 910 *et seq.*; 4th ed. par. 865 *et seq.* See, also, *Arden* v. *Arden*, 29 Ch. D. 702, at p. 709.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

This sub-section appears to contemplate the cases represented by *Tulk* v. *Moxhay*, 2 Ph. 774; including restrictive covenants

in superior leases. Only negative covenants are within the principle of that case. (*Haywood* v. *Brunswick Bdg. Soc.*, 8 Q. B. D. 403; *L. & S. W. Rway. Co.* v. *Gomm*, 20 Ch. D. 562, see p. 583; *Austerberry* v. *Corp. of Oldham*, 29 Ch. D. 750.) But in *Andrew* v. *Aitken*, 22 Ch. D. 218, Fry, J., seems to have thought that, though the assignee of the lands could not be compelled to perform an affirmative covenant, he might be obliged to permit it to be performed by the persons liable to perform it. This, however, seems to be a novel suggestion. And in *Irving* v. *Turnbull*, 1900, 2 Q. B. 129, it was held that a purchaser might be liable under an implied contract.

As to the circumstances under which restrictive covenants can be enforced by other persons who have entered into similar covenants, see *Nottingham, &c. Brick Co.* v. *Butler*, 15 Q. B. D. 261, at p. 268, affirmed 16 Q. B. D. 678; and *Collins* v. *Castle*, 36 Ch. D. 243; *Holloway Brothers, Ltd.* v. *Hill*, 87 L. T. 201.

Restrictive covenants cease to be enforceable, when they cease to be appropriate to the circumstances; as, for example, by a change in the character of a building estate caused or permitted by the covenantee (see *Sayers* v. *Collyer*, 24 Ch. D. 180; 28 Ch. D. 103); or by acquiescence in breaches of similar covenants committed by other covenantors (*Kelsey* v. *Dodd*, 52 L. J. Ch. 34). A delay (say) of fourteen months in taking proceedings to prevent the continuance of a breach of a restrictive covenant will not of itself disentitle a covenantee to an injunction. (*D. of Northumberland* v. *Bowman*, 56 L. T. 773.)

Notice of a restrictive covenant may be constructive notice. (*Wilson* v. *Hart*, L. R. 1 Ch. 463; *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391; *S. C.* 1906, 1 Ch. 386.)

Though "purchaser" includes an "intending purchaser," the sub-section will not of course affect the ordinary right to determine a contract which does not disclose unusual restrictions in the title.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

Registration is not constructive notice to a purchaser who has omitted to search a Registry; and, in the absence of express notice, it gives no priority over a subsequent registered deed which conveys the legal estate (*Morecock* v. *Dickins*, Ambl. 678); nor, in such absence, does it prevent a prior mortgagee from tacking a subsequent charge which has been duly registered. (*Bedford* v. *Backhouse*, 2 Eq. Ca. Ab. 615.) But, coupled with notice, it prevents the tacking of a prior further charge which has not been registered. (*Credland* v. *Potter*, L. R. 10 Ch. 8.)

A mortgagee or purchaser need not search; but, if he searches, notice will be presumed from the date at which his search commenced. (*Procter* v. *Cooper*, 2 Drew. 1; *Hodgson* v. *Dean*, 2 Sim. & St. 221.)

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(4.) This section applies to purchases made either before or after the commencement of this Act; [save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.]

The words in square brackets are repealed by the Statute Law Revision Act, 1898.

Leases.

Sect. 4. Contract for lease not part of title to lease.

4.—(1) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

As between the parties to a lease, the contract is discharged by the execution of the lease; and if the lease varies from the contract, the provisions of the former prevail over those of the latter; according to the general rule, that a parol contract is superseded by the subsequent execution of a deed. (*Williams* v. *Morgan*, 15 Q. B. 782; *Leggott* v. *Barrett*, 15 Ch. D. 306, at p. 309; *Teebay* v. *Manchester Rway. Co.*, 24 Ch. D. 572.) But this rule does not necessarily apply when the lessor grants under a power and not by virtue of his estate. In such a case, the present section would prevent a subsequent purchaser of the lease from being affected with constructive notice of the contract. But it does not appear that this provision would have any practical effect, unless under the construction of the power, the donee is subject to restrictions with regard to contracts which do not affect and would not appear by the terms of the lease; and it does not commonly happen in practice that this is the case. Such is to a certain extent the case with regard to contracts for leases under S. L. Act, 1882. But that particular case is specially provided for by s. 31, sub-s. (4) of that Act.

Separate Trustees.

Sect. 5. Appointment of separate sets of trustees.

5.—(1.) *On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one*

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trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

(2.) *This section applies to trusts created either before or after the commencement of this Act.*

This section was repealed by the Trustee Act, 1893 ; and is replaced by part of s. 10, sub-s. (1), (b), of that Act. See p. 391, *post.*

Powers.

Sect. 6. Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power ; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

The provisions respecting powers, contained in this and the foregoing Act, are summarized in the note on s. 52 of the Conv. Act, 1881, p. 146, *ante.*

It seems that, in a joint appointment, a power of revocation cannot be reserved to one appointor only. (*Burnaby* v. *Baillie*, 42 Ch. D. 282.)

This section will not enable a tenant for life to disclaim his statutory powers under S. L. Act, 1882. (See s. 50, sub-s. (1), of that Act, p. 311, *post.*)

If all the donees, being trustees, should disclaim their powers, these would, of course, be exerciseable by any subsequently appointed trustees.

The object of this section seems to be to enable that to be done by a part of the trustees, which previously could have been done only by the whole body. In cases where, by reason of the reposal of a personal discretion in the whole body, a disclaimer by any one or more would practically amount to a release and extinction, it is submitted that this section does not apply, even though the instrument containing the power should not contain any express declaration to that effect. (See *Re Eyre, E.* v. *E.*, W. N. 1883, p. 153 ; 49 L. T. 259 ; and Conv. Act, 1881, s. 52, note, p. 146, *ante.*)

Where the power is coupled with an interest, the deed of disclaimer should not purport to convey the interest, but only

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to disclaim the power. (See *Urch* v. *Walker*, 3 My. & Cr. 702; *Crewe* v. *Dicken*, 4 Ves. 97; *Nicolson* v. *Wordsworth*, 2 Swanst. 365; which cases are somewhat at variance.) It seems clear that the power cannot be disclaimed without also disclaiming any legal estate to which the power, if accepted, would be annexed.

If a power is given by will "to my executors herein named," and one renounces probate, such renunciation amounts to a disclaimer of the power, and the others can exercise it. (*Crawford* v. *Forshaw*, 1891, 2 Ch. 261.)

There seems to be no reason why a married woman should not, under this section, disclaim a power not coupled with any interest without the concurrence of her husband. If the power is coupled with an interest, then—(1) If she is a trustee, it is at least the safer opinion that her husband's concurrence is still necessary, except in cases coming within the Trustee Act, 1893, s. 16, p. 399, *post*, and cases relating to such personal property as is specified in the M. W. P. Act, 1882, s. 18, p. 475, *post*; (2) if her power is not purely ministerial or official, the husband's concurrence will be necessary, unless the woman was married, or the interest was created, subsequently to the commencement of the last-mentioned Act.

As to disclaimer by conduct, see note on Trustee Act, 1893, s. 10, sub-s. (4), p. 393, *post*.

A disclaimer by a trustee which purports to extend only to a part of the property, is wholly inoperative. (*Re Lord and Fullerton*, 1896, 1 Ch. 228.)

The introduction into the marginal note of the words "by trustees," which nowhere appear in the body of the section, suggests a suspicion that sub-s. (2) of this section was only designed to supply a defect in Conv. Act, 1881, s. 38 (see now the Trustee Act, 1893, s. 22, and note thereon, p. 407, *post*), which provided for the survivorship of a joint power in *executors* or *trustees* on a death, but did not provide for the continuance of the power on a disclaimer, although s. 52 of that Act seems to have made such a disclaimer possible. In practice, powers are seldom, if ever, vested in several persons, unless they are either executors or trustees; and the question, whether this section extends to powers annexed neither to an estate nor to a trust or office, is not of practical importance.

There existed at one time some difference in opinion as to the authority of marginal notes in an Act of Parliament. In *Venour* v. *Sellon*, 2 Ch. D. 522, Jessel, M.R., said that marginal notes form part of the Act. This doctrine was subsequently disapproved by the Court of Appeal in *Att.-Gen.* v. *G. E. R.*, 11 Ch. D. 449, see pp. 461, 465; and in *Claydon* v. *Green*, L. R. 3 C. P. 511, the Court of Common Pleas sitting in banc had previously expressed the opinion that marginal notes form no part of the statute, and are not binding as an explanation. In *Sutton* v. *Sutton*, 22 Ch. D. 511, at p. 513, Jessel, M.R., withdrew his *dictum* in *Venour* v. *Sellon*, and it may now be considered settled, that the marginal notes have no authority. This

accords with the opinion of the Statute Law Committee. In the Revised Edition of the Statutes, the marginal notes have been freely revised throughout by the Editors. (See also *Osborne* v. *Milman*, 18 Q. B. D. at p. 477, and *D. of Devonshire* v. *O'Connor*, 24 Q. B. D. at p. 478.)

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Married Women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners or one special commissioner"; and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner"; and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

Sect. 7. Acknowledgment of deeds by married women.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

As to deeds executed after 31st Dec., 1882, no certificate of acknowledgment will be required to be made or filed; see schedule, and note (*a*), p. 201, *post*; and the deed will take effect immediately on acknowledgment.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a Judge of the High Court [of Justice] in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or

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commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, [and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.]

39 & 40 Vict. c. 59.

44 & 45 Vict. c. 68.

40 & 41 Vict. c. 57.

The words in square brackets are repealed by the Statute Law Revision Act, 1898.

This, so far as it relates to England, is a re-enactment, with such formal alterations in the list of specified officials, and otherwise, as later legislation has made appropriate, of 17 & 18 Vict. c. 75, sects. 1 and 3, which are now repealed; see Schedule, p. 201, *post*.

(4.) *The enactments described in the Schedule to this Act are hereby repealed.*

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) *Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.*

Repealed by the Statute Law Revision Act, 1898, as to sub-sects. (4) and (6).

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(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

By the M. W. P. Act, 1882, the marital right and its incidents *inter vivos* are, with regard to women married after its commencement, practically abolished, and, in the case of women previously married, are abolished in respect to property taken by a subsequently accruing title; so that property to which the marital right of husbands is applicable will tend continually to decrease, and all property belonging or coming to a married woman will, after a time, be held or taken by her for her separate use. Since a married woman can dispose of her separate estate, so far as the separate use extends, by deed without acknowledgment (*Pride* v. *Bubb*, L. R. 7 Ch. 64, which seems to overrule *Lechmere* v. *Brotheridge*, 32 Beav. 353), it seems to follow that the practice of acknowledging deeds will tend to become obsolete. As to property not coming within the Trustee Act, 1893, s. 16, and as to such personal property as is specified in the M. W. P. Act, 1882, s. 18, which is held by her as a trustee, or *en autre droit*, see note at p. 475, *post*.

Powers of Attorney.

Sect. 8. Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power

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without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

See note on the next following section.

Sect. 9. Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

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(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 26, trustees, executors, and administrators, acting under a power of attorney without notice of the death of the principal, are protected.

Sects. 8 and 9 of the present Act must be read in connection with sects. 46 and 47 of Conv. Act, 1881, pp. 137 and 139, *ante*. (See notes thereon ; and in particular, the note on p. 140.)

These sections will facilitate dealings with persons acting under powers of attorney executed after 31st Dec., 1882, and which are *expressed to be* irrevocable either indefinitely, if the power be given for value, or for a period not exceeding a year in other cases. It is not clear whether, in the former case, an express limit could be imposed on the period of irrevocability ; but such a limit would probably be upheld, on the analogy of the maxim, *Cujus est dare, ejus est disponere*. The old forms used by conveyancers often purported to make irrevocable appointments, but such appointments were nevertheless revocable at will, and were *ipso facto* revoked by death. But the Courts of Equity were accustomed to "give effect to all *bonâ fide* dealings with the attorney which took place after the death of the principal and before the death became known to the attorney; especially where valuable consideration passed." (1 Dav. Prec. 4th ed. 475 ; 5th ed. 387.) Nor would equity permit the principal to revoke a power given for valuable consideration. (*Bromley* v. *Holland*, 7 Ves. 3, at p. 28 ; *Metcalfe* v. *Clough*, 2 Man. & Ry. 178.)

It will be observed that, under the present section, the year during which the power of attorney may be made irrevocable is computed from the *date* of the instrument. The language of this enactment is closely parallel to that of the Statute of Inrolments, 27 Hen. 8, c. 16,—"within six months next after the *date* of the same writings indented;" where, according to Preston, the word "date" means the day of the date of the deed, not of the delivery. (1 Prest. Abst. 288.) But according to an *obiter dictum* of Lord Eldon, in *Underhill* v. *Horwood*, 10 Ves. 209, at p. 228, the day of the date is the day of the execution. The bargain and sale takes effect upon the freehold immediately upon its execution ; but subject to defeasance *ab initio* unless inrolled within the prescribed time. (*Robinson* v. *Comyns*, Cas. temp. Talb. 164 ; 1 Prest. Conv. 38.)

C. A. 1882, Sect. 9.

As to the law of New South Wales, see *Mutual, &c. Society* v. *Macmillan*, 14 App. Cas. 596.

Executory Limitations.

Sect. 10. Restrictions on executory limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

The cases dealt with in this section must be distinguished from those where property is given over if the donee should die without ever having had a child. In such cases the gift over fails directly a child is born and the section is not applicable. (See *Re Booth, Pickard* v. *Booth*, 1900, 1 Ch. 768.)

It is not clear that this section applies to an executory limitation in defeasance of an equitable fee simple, or, in general, to executory limitations of trusts as distinguished from uses. The definition of "land" in Conv. Act, 1881, s. 2, sub-s. (ii.), p. 12, *ante*, would include equitable fees simple; but that definition is not incorporated into the present Act.

A tenant in fee simple, subject to an executory limitation, could not defeat that limitation by a common recovery (*Pells* v. *Brown*, Cro. Jac. 590); though a tenant in tail could thereby defeat an executory limitation upon his estate tail.

Such a limitation might have been barred by non-claim on a fine levied with proclamations; but the period of non-claim began to run, not from the levying of the fine, but from the vesting of the executory interest. The same rule applies both to executory devises and to springing and shifting uses. "It is frequently said, that an executory devise cannot be barred by a common recovery. The truth is, that a tenant in fee, subject to an executory devise, cannot by recovery, or by any other means, except by a fine or [*read*, and] non-claim on a fine, defeat an executory devise to which the estate is subject." (3 Prest. Abstr. 139.) "A springing or shifting use cannot be barred by a fine, levied of the estate out of which such springing or shifting use is to arise, unless there be a non-claim of five years after it

C. A. 1882, Sect. 10.

arises." (Cruise, 1 Fines & Rec., 3rd ed. p. 313.) The practical effect of the fine was only to shorten the period of limitation to five years.

The present section destroys the executory limitation at the time when the son or other issue of the person entitled, if such issue had been tenant in tail, might, with the consent of the person entitled, if the latter had been tenant of an estate for life preceding the estate tail, have acquired a fee simple in remainder; whereas, previously to this enactment, the executory limitation could not have been defeated at any time during the life of the person entitled subject thereto.

Executory limitations of terms of years are only possible by way of devise (see note on Conv. Act, 1881, s. 65, sub-s. (2), at p. 163, *ante*), and they do not often occur in practice. An estate *pur autre vie*, already *in esse*, as a leasehold estate for lives, is sometimes devised subject to an executory limitation to take effect on default of issue. (See *Re Barber's S. E.*, 18 Ch. D. 624.)

A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event, has the powers of a tenant for life under S. L. Act, 1882. (See s. 58, sub-s. (ii.), of that Act, p. 324, *post*.)

Long Terms.

Sect. 11. Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

See Conv. Act, 1881, s. 65, p. 160, *ante*, and notes thereon.

Mortgages.

Sect. 12. Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate

C. A. 1882, Sect. 12.

incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

Since, in Conv. Act, 1881, s. 2, sub-s. (vi.), the word "mortgagor" is made to include any person entitled to redeem, it includes a puisne incumbrancer; and this view was taken in *Teevan* v. *Smith*, 20 Ch. D. 724. Hence, there might be an unlimited number of persons, all of whom would equally be entitled to exercise the right conferred by s. 15 of that Act. The object of the latter part of the present section is to remove all doubt as to whether the existence of mesne incumbrancers disables a puisne mortgagee from requiring a transfer of a prior mortgage, and also to prevent a prior incumbrancer from being ousted of his right by the fact of a demand for transfer having been first made by a subsequent incumbrancer. The section makes no provision as to the point of time at which interference by the prior incumbrancer will come too late, and, as expense might be fruitlessly incurred, it will be desirable, when a puisne incumbrancer proposes to exercise the right, for him to give notice to all incumbrancers intervening between himself and the person on whom he proposes to make the demand.

This last remark, however, does not apply to cases in which a third mortgagee, who has taken his charge without notice of the existence of the second mortgage, wishes to protect himself, under the doctrine of tacking, by getting in the legal estate. The present enactment will to a certain extent lessen the mischief of that doctrine by depriving the first mortgagee, who has the legal estate, of his power to prefer either of the subsequent mortgagees to the other. As soon as the second mortgagee has learned that a third mortgage exists, he will be able to require that the first mortgage shall be transferred to himself. The protection given by the legal estate is effectual, even though the legal estate has been acquired *pendente lite*; but not if it has been acquired after decree. (*Brace* v. *Duch. of Marlborough*, 2 P. Wms. 491; *Ex pte. Knott*, 11 Ves. 609, at p. 619.)

If a jointress, or other annuitant, redeems a prior mortgage, a subsequent mortgagee can compel a transfer of the prior mortgage only upon the terms that, after the transfer, it shall be subject to the jointure or annuity. (*Smithett* v. *Hesketh*, 44 Ch. D. 161.) From a remark of North, J., at the bottom of p. 165, it would appear that, in his opinion, if a demand for a transfer under this section is made in the course of a foreclosure action, the transfer cannot be made to a stranger to the suit.

Saving.

Sect. 13. Restriction on repeals in this Act.

13. *The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder*

before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

C. A. 1882, Sect. 13.

This section is repealed by the Statute Law Revision Act, 1898. See note on Conv. Act, 1881, s. 71, *ante*.

SCHEDULE.

Schedule. Section 7 (4).

Repeals.

3 & 4 Will. 4, c. 74	The Fines and Recoveries Act	in part; namely,— Section eighty-four, from and including the words "and the same judge," to the end of that section (*a*). Sections eighty-five to eighty-eight inclusive (*a*).
4 & 5 Will. 4, c. 92	The Fines and Recoveries (Ireland) Act	in part; namely,— Section seventy-five, from and including the words "and the same judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75	An Act to remove doubts concerning the due acknowledgments (*b*) of deeds by married women in certain cases (*c*).	
41 & 42 Vict. c. 23	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.	

The schedule is repealed by the Statute Law Revision Act, 1898.

(*a*) These sections relate to the making and filing of certificates of acknowledgments.

(*b*) In the title of the original Act, the word is "acknowledgment."

(*c*) The provisions of this Act are re-enacted, with variations, in s. 7 of the present Act, *ante*.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

(55 & 56 Vict. c. 13.)

An Act to amend the Conveyancing and Law of Property Act, 1881. [20th June, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:

Preliminary.

Sect. 1. Short title and extent. 44 & 45 Vict. c. 41. 45 & 46 Vict. c. 39.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act shall be read together and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

(2.) This Act does not extend to Scotland.

Leases, Under-leases, Forfeiture.

Sect. 2. Costs of waiver, and forfeiture in case of bankruptcy or execution. [*See Conv. Act*, 1881, *s.* 14, *p.* 63, *ante*.]

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the

provisions of the Conveyancing and Law of Property Act, 1881, or of this Act.

C. A. 1892, Sect. 2.

This gives no remedy to a lessor against an underlessee. (*Nind* v. *Nineteenth Cent. Bdg. Socy.*, 1894, 2 Q. B. 226.) And it gives him no remedy against his own lessee, if the latter escapes from forfeiture, by what may be called the automatic action of s. 14, without anything being done by the Court. (*Ibid.*)

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto.

To come within this provision, the sale must be completed by conveyance, or the contract entered into must be an absolute contract for sale. (*Re Henry Castle & Sons, Ltd., Mitchell* v. *Henry Castle & Sons, Ltd.*, 94 L. T. 396.)

(3.) Sub-section two of this section is not to apply to any lease of—

(a.) Agricultural or pastoral land :

(b.) Mines or minerals :

(c.) A house used or intended to be used as a public-house or beershop :

(d.) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures :

(e.) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

See note on Conv. Act, 1881, s. 14, sub-s. (6), p. 68, *ante*. In *Fryer* v. *Ewart*, 1902, A. C. 187, the operation of sub-s. (2) was

C. A. 1892, Sect. 2.

excluded by sub-s. (3) (c) by reason of the property being a public-house.

Sect. 3. No fine to be exacted for licence to assign.

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

It is conceived that, under this somewhat obscure enactment, the exaction of a fine would, by virtue of the supposed proviso, operate a defeasance of the covenant; and therefore that the lessee might assign without being guilty of a breach. This view is now held to be correct. (*Andrew* v. *Bridgman*, 1908, 1 K. B. 596.)

But the section does not make the payment of a fine illegal, and if a fine be paid without duress it cannot be recovered. (*Andrew* v. *Bridgman*, 1907, 2 K. B. 494; 1908, 1 K. B. 596.) *Semble*, a condition by the lessor that the proposed assignee shall covenant to pay the rent and perform the covenants of the lease during the residue of the term is not a fine within the meaning of the section. (*Waite* v. *Jennings*, 1906, 2 K. B. 11.)

The requirement by the lessor of an increased rent as a condition for assenting to the assignment is in the nature of a fine, and a lessor who refuses to give his consent except upon such a condition is withholding his consent unreasonably. (*Jenkins* v. *Price*, 1907, 2 Ch. 229, reversed upon another point, 1908, 1 Ch. 10.)

A lessor may require the deposit of a sum by way of security for performance of the unfulfilled part of a building contract, before consenting to the assignment of the lease of a house previously granted under the same contract. (*Re Cosh's Contract*, 1897, 1 Ch. 9.)

Sect. 4. Power of court to protect under-lessees on forfeiture of superior leases.

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the

C. A. 1892, Sect. 4.

property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

See notes on Conv. Act, 1881, s. 14, p. 63, *ante*. This enactment was passed in consequence of the decision in *Burt* v. *Gray*, 1891, 2 Q. B. 98, that an underlessee could not obtain relief under that section against forfeiture of the lease out of which his underlease was derived. Relief can now only be given by the peculiar form of vesting order here prescribed; and may be obtained by defence and counterclaim in the lessor's action to obtain possession. (*Warden, &c. of Highgate School* v. *Sewell*, 1893, 2 Q. B. 254.) Relief may under this section be given to an underlessee in cases where none could be given to the lessee himself. (*S. C.* 1894, 2 Q. B. 906.) The Court has jurisdiction to relieve an underlessee against forfeiture occasioned by the lessee's breach of a covenant against assignment, but will be cautious in exercising it. (*Imray* v. *Oakshette*, 1897, 2 Q. B. 218.)

The section gives the Court a wide discretion as to the conditions upon which a vesting order should be granted, and enables it to impose such conditions as the circumstances of each particular case may require: *e.g.*, the words "payment of rent" are not limited to rent actually due, and the Court will refer it to Chambers to consider what is a fair rent for the underlessee to pay. (*Ewart* v. *Fryer*, 1901, 1 Ch. 499; and see *London Bridge Buildings Co.* v. *Thomson*, 89 L. T. 50.) In the absence of special circumstances, the costs of the new lease and the inquiry are payable by the underlessee. (*Ewart* v. *Fryer*, 18 Times L. R. 590.)

The section is not a mere amendment of s. 14 of the Act of 1881, extending the provisions of that section to underleases, but an independent provision for affording relief to underlessees against forfeiture for breach of any covenant in the head lease, and therefore relief can be given under this section to an underlessee against a forfeiture of the head lease for non-payment of rent. (*Gray* v. *Bonsall*, 1904, 1 K. B. 601.)

The estate or interest vested in the underlessee is a new one,

C. A. 1892, Sect. 4.

and the section makes no alteration in the law with regard to the time at which the lessor must be taken to have determined to avail himself of a forfeiture. (*Serjeant* v. *Nash, Field & Co.*, 1903, 2 K. B. 304.)

Sect. 5. Extension of definitions of "lease," "under-lease," and "under-lessee."

5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted, and in this Act "under-lessee" shall include any person deriving title under or from an under-lessee.

See the last preceding note. The declaration as to the extended meaning of "lease" seems not to alter the previous law. (See *Swain* v. *Ayres*, 21 Q. B. Div. 289, and cases *ante*, p. 65.)

Trustees.

Sect. 6. *Trustee may be appointed for separate parts of property though no new trustee be appointed of other parts.*

6. *A separate set of trustees or a separate trustee may be appointed under the fifth section of the Conveyancing Act*, 1882, *of a part only of the trust property, notwithstanding that no new trustees or trustee are to be appointed of other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; and every appointment already made of a separate set of trustees shall be valid notwithstanding that there was no retiring trustee of other parts of the trust property, and that no new trustees were appointed of such other parts thereof.*

This section was repealed by the Trustee Act, 1893; and is replaced by part of s. 10, sub-s. (2) (*b*), of that Act. See p. 391, *post*.

THE SETTLED LAND ACT, 1882.

(45 & 46 Vict. c. 38.)

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.

[10th August, 1882.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I.—Preliminary.

Sect. 1.
Short title ; commencement ; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

The provisions of the Act are applicable to settlements in existence at the time of its commencement, but it has not otherwise any retrospective operation. The coming into operation of the Act did not validate anything done before its commencement, which, although it would have been valid if done afterwards, was not valid at the time at which it was done. But S. L. Act, 1887, s. 1, p. 349, *post*, permits capital money to be applied in payment of rent-charges, created before its enactment, for the purpose of effecting improvements which are of a kind authorized by the present Act. And S. L. Act, 1890, s. 15, enables the Court to direct capital money to be applied in payment for authorized improvements, notwithstanding that a scheme was not approved before their execution.

S. L. A. 1882, Sect. 1.

(3.) This Act does not extend to Scotland.

The S. L. A. was founded upon a broader policy, and has a larger scope than the Settled Estates Acts, in which the Legislature did not look beyond the interests of the persons entitled under the settlement. In the S. L. A. the paramount object of the Legislature was the well-being of settled land, and this main purpose is not to be frustrated by too nice a regard for the interests of persons entitled under the settlement. (*Bruce* v. *Marq. of Ailesbury*, 1892, A. C. 356, 364, 365.) One of the objects of the Act is the improvement of land (*per* Chitty, J., in *Clarke* v. *Thornton*, 35 Ch. D. p. 311). And as one of the obstacles to the well-being of settled land is the existence of incumbrances, the Court will not readily interfere with a sale which, by the proper application of the purchase money, might result in the removal of such an obstacle. (*Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778, 793.)

At the same time, the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase money, and the Act ought to be construed by the Court with regard to these broad principles and in a spirit of wise and reasonable liberality. (*Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 289.)

And the Legislature has provided by s. 51 that any attempt by the settlor to take away from a tenant for life the powers conferred by the Act shall be ineffectual. (*Re Smith, Grose-Smith* v. *Bridger*, 1899, 1 Ch. 331, 333.)

The Act is one which ought certainly not to receive a narrow construction (*per* Stirling, J., in *Re Pocock and Prankerd*, 1896, 1 Ch. p. 307). The policy of the law is to regard the provisions of the Act as being beneficial, and not to cut down the class or number of persons coming within the definition of "tenant for life" (*per* Romer, L.J., in *Re Baroness Llanover's Will, Herbert* v. *Freshfield*, 1903, 2 Ch. 16).

The Act was intended to get rid of a number of old authorities and to enable a tenant for life to do that which he could not have done before the Act. Consequently the cases decided before the Act are of no assistance in construing it (*per* Lindley, M.R., in *Re Gladstone*, 1900, 2 Ch. p. 105, and *per* Collins, M.R., in *Re Aldam's S. E.*, 1902, 2 Ch. p. 56).

For the purpose of determining the question of construction whether certain improvements are within the scope of the Act, the Court ought not to take into account the greatness or smallness of the proposed works unless they are so trivial as not to affect the question of letting or not letting (*per* Farwell, J., in *Re Calverley's S. E.*, 1904, 1 Ch. p. 155).

But the wide interpretation which the policy of the law requires to be given to the Act does not apply to those parts of the Act which apply to the acquisition, and not to the sale, of settled land (*per* Kekewich, J., in *Re Bruce, Halsey* v. *Bruce*, 1905, 2 Ch. p. 375).

S. L. A. 1882, Sect. 2.

II.—Definitions.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

See also S. L. Act, 1890, s. 4, sub-s. (1), p. 352, *post*.

"Act of Parliament" includes public Acts, if relevant; such as the Thellusson Act. (*Vine* v. *Raleigh*, No. 2, 1896, 1 Ch. 37.)

A settlement of personalty only with power to invest in land is within the Act on the investment being made by the trustees. (*Re Child's Settlement*, 1907, 2 Ch. 348.)

A private Act of Parliament which confers upon the trustees certain powers of developing and managing the land on a building estate, but does not incorporate the settlement or create any limitations, does not form part of the settlement. (*Talbot* v. *Scarisbrick*, 1908, 1 Ch. 812.)

The mere fact that the husband of a married woman, who is entitled in fee simple for her separate use, might by possibility become tenant by the curtesy, will not create a succession. (*Bates* v. *Kesterton*, 1896, 1 Ch. 159.) Nor does the fact that he is tenant by the curtesy on the death of his wife, because he derives his life estate not under the instrument but under the general law. (*Re Pocock and Prankerd*, 1896, 1 Ch. p. 306.) Though such a case is now provided for by S. L. A., 1884, s. 8, *post*, p. 347.

Under this section it seems that the creation of "a succession" is requisite to the creation of a tenant for life; but under s. 58, sub-s. (1) (ix.), p. 327, *post*, a person may have the powers of a tenant for life, although there is not, strictly speaking, any succession created. (*Re Pocock and Prankerd*, 1896, 1 Ch. 302.)

An award under an Inclosure Act "to A. B. and his successors, vicars of X.," of lands in respect of glebe does not create a succession, and therefore is not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession," so as to constitute a settlement within the meaning of s. 2 (1). (*Ex pte. Vicar of Castle Bytham*, 1895, 1 Ch. 348. And see *Re Bishop of Bath and Wells*, 1899, 2 Ch.

S. L. A. 1882, Sect. 2.

138, where North, J., followed this decision, and observed that the S. L. Act had never been applied to ecclesiastical property.)

The definition of settlement given in this section is incorporated into the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1), and the decisions under that Act may be of assistance in determining what is a settlement under this section. (See *A.-G.* v. *Owen*, 1899, 2 Q. B. 253; *Re Campbell*, 1902, 1 K. B. 113.)

The words in the section "stands for the time being limited to or in trust for any persons by way of succession," have no technical force, and according to their natural meaning include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. (*Re Mundy and Roper*, 1899, 1 Ch. 273.) And the words also include the case of a settlement on the settlor for life with remainder (subject to a jointure portion and terms to secure the same) to the settlor in fee. (*Re Phillimore*, 1904, 2 Ch. 460; *Re Marshall's Settlement*, 1905, 2 Ch. 325.)

Since different lands may by the same instrument be limited in different lines of succession, several settlements may be created by the same instrument; and it is clear that separate remainders of separate parts, upon a life estate in the whole, will effect separate settlements. It has been held by Stirling, J., in *Re Lord Stamford's S. E.*, 43 Ch. D. 84, that the interposition of a long term of years, if the limitations are otherwise identical, will not effect a severance in the settlement; but this decision seems to depend upon the nature of the trusts of the term; and it is conceived that it cannot be relied upon as establishing a general proposition. If a will directs money to be laid out in the purchase of lands to be conveyed to the uses of an existing settlement, such lands and the lands comprised in the settlement will form one settled estate. (*Re Mundy's S. E.*, 1891, 1 Ch. 399; and see *Re Eyre Coote*, *Coote* v. *Cadogan*, W. N. 1899, p. 222.) In a case where the limitations of a will were identical, except for the interposition of two terms of years, the trusts of which had become satisfied, with those of a previous settlement made by the testator but not referred to in the will, it was held that the deed and the will constituted one settlement. (*Re Byng's S. E.*, 1892, 2 Ch. 219. And see *Re Lord Stafford's Settlement*, *Gerard* v. *Stafford*, 1904, 2 Ch. 72; *Re Coull's S.E.*, 1905, 1 Ch. 712.) So where an equity of redemption was settled upon the trusts declared by an existing settlement, it was held that the two instruments formed one settlement. (*Re Lord Monson's S. E.*, 1898, 1 Ch. 427.) And if the remainders limited upon the determination of a life estate are identical as to the whole of the settled lands, but it happens that, by reason of the legal estate in a part of the lands being outstanding, there is a possibility that contingent remainders in the other part may fail which does not affect the first mentioned part, this possibility of severance does not, before the contingency has happened, prevent the whole from forming one settled estate. (*Re Freme*, *F.* v. *Logan*, 1894, 1 Ch. 1.)

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The question of compound settlements is one that has frequently arisen. It was held by Stirling, J., in *Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. 345, that where a series of settlements extending over several generations has been effected by means of powers of appointment and disentailing assurances, the whole series forms one settlement within the meaning of s. 2 (1), so as to enable the tenant for life to sell free from jointures created under powers contained in a deed prior to that by which his life estate was created. This decision, though it gave rise to a great deal of comment at the time, has since been approved by the Court of Appeal in *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275. In that case, the tenant for life who was selling had been appointed tenant for life by the original deed, though the later deed did not state that the life estate thereby limited was in continuation of the earlier life estate; consequently the point involved was a much narrower one than that raised before Stirling, J. But the earlier decision was so thoroughly examined and adopted by the Court of Appeal that its correctness could hardly be called in question now, except before the House of Lords. The principle of *Re Marquis of Ailesbury and Ld. Iveagh* was still more recently followed in *Re Phillimore, Phillimore* v. *Milnes*, 1904, 2 Ch. 450, where land was settled upon trusts for the settlor for life, and subject thereto to pay certain annuities, and subject thereto for the settlor in fee. The settlor died, having by his will devised the property in strict settlement, and it was held that the settlement and the will formed a compound settlement under which the land could be sold free from the annuities. It may, therefore, now be considered as established that the settlement for the purposes of the Acts may be taken to be compounded of all instruments under which the settled land, at the time when the instrument conferring the existing life estate takes effect, stands limited to uses in favour of persons by way of succession (as to the meaning of which phrase see *supra*, p. 210), and that the tenant for life can on the appointment of trustees, for the purposes of this compound settlement, convey the land free from estates and interests limited by the earlier deeds.

It will be observed that the question who were the trustees of a compound settlement, the trustees appointed by any deed being only trustees of the settlement made by that deed, has been got over by the Court appointing trustees for the purposes of the Acts of the compound settlement. The question then arose whether when interests arising under a settlement had been dealt with by subsequent deeds, so that a compound settlement was subsisting, trustees of the compound settlement had to be appointed before the settled property could be dealt with under the Acts. It was held soon after the passing of the Act of 1882 that derivative settlements are not considered for this purpose. *(Re Knowles*, 27 Ch. D. 707.) Some difficulty was caused by the decision of North, J., in *Re Tibbit's S. E.*, 1897, 2 Ch. 149 (following *Re Meade's S. E.*, 1897, 1 I. R.

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121), that inasmuch as under s. 4 of the S. L. Act, 1890 (as to which see p. 352, *post*), instruments in consideration of marriage, or as part or by way of family arrangement, are to be reckoned amongst the instruments creating the settlement, it was necessary, when trustees of the settlement for the purposes of the Acts were appointed by the Court, that the appointment should be expressed to extend to these instruments. But if these cases decide anything more than that the Court has jurisdiction to treat an original settlement and such instruments as together composing one compound settlement, and to appoint trustees of such compound settlement accordingly, they must now be taken to be overruled by the subsequent cases (*Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, approved in *Re Mundy and Roper's Contract*), which have decided that the original settlement does not cease to be the settlement for the purposes of the Acts because the interests thereby created have been affected by subsequent instruments by way either of charges for jointure or portions (*Re Keck and Hart's Contract*, 1898, 1 Ch. 617), or of family arrangement (*Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96), or of re-settlement. (*Re Mundy and Roper's Contract*, 1899, 1 Ch. 275.) See, however, *Re Domvile and Callwell's Contract*, 1908, 1 I. R. 475, in which case the Court of Appeal in Ireland took the view that when charges had been created under the powers given by a disentailing deed, a purchaser was entitled to insist on the appointment of trustees of the compound settlement, created by the original settlement and all the subsequent deeds.

It was also decided in *Re Mundy and Roper's Contract* (*ubi sup.*) that there may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds only. And inasmuch as by s. 50 (*post*, p. 311) the powers of a tenant for life are not capable of assignment or release, and remain exercisable after and notwithstanding any assignment by operation of law or otherwise, it follows that several settlements within the meaning of the Act can co-exist at the same time, and the trustees for the purposes of the Acts of any one of these settlements retain their powers of receiving and giving receipts for purchase-money, notwithstanding the existence of the other settlements. Thus if land be settled in strict settlement, with a power of jointuring which is exercised, and the tenant for life and his eldest son disentail and re-settle, then if the original tenant for life be expressed to have a new life estate under the settlement, there are in existence at one and the same time three "settlements" within the meaning of the Act. Thus he can exercise his statutory powers as tenant for life either under the first settlement (*Re Lord Wimborne and Browne's Contract*, 1904, 1 Ch. 537; but see *Re Domvile and Callwell's Contract*, *supra*), or under the compound settlement created by the original settlement, the disentailing deed, and the re-settlement (*Re Mundy and Roper's Contract*, 1899, 1 Ch. 275), or under the re-settlement only (*ibid.*); but in the last case he cannot convey

the estate freed from estates, interests, or charges arising under the original settlement, as these have priority to the settlement under which his conveyance is made. But if the life estate under the re-settlement is expressed to be in continuation and restoration of the original life estate, though the tenant for life can sell under the original settlement or the compound settlement, he cannot sell under the re-settlement alone, even if the sale be made subject to the prior estates, or with the concurrence of the persons having such prior estates. (*Re Cornwallis West and Munro's Contract*, 1903, 2 Ch. 150, as explained by *Re Lord Wimborne and Browne's Contract*, 1904, 1 Ch. 537.) S. L. A. 1882, Sect. 2.

Uses may be declared upon the seisin of a feoffee; and therefore a settlement may be made by feoffment. It is probable that this sub-section will be held to include such settlements, though its language is not well adapted to that purpose. By the 8 & 9 Vict. c. 106, s. 3, a feoffment, other than a feoffment made under a custom by an infant, is void unless *evidenced* by deed; and by the Statute of Frauds (29 Car. 2, c. 3), s. 1, no feoffment can convey any greater estate than a tenancy at will, unless it is "put in writing," signed by the feoffor or his agent thereunto lawfully authorized in writing. The deed by which the feoffment is evidenced, or, in the case of a feoffment made under a custom by an infant, the writing into which the feoffment is "put," will probably be held to be "instruments" within this sub-section, although they only remove a statutory impediment to the operation of the feoffment at the common law.

On feoffments made by infants of lands subject to the custom of gavelkind, see Robinson on Gavelkind, Bk. ii., ch. 3; Challis, R. P. 368. Settlements thus made by infants are by no means unknown at the present day; but it is the usual practice to execute a subsequent deed of confirmation.

A summons in relation to a settlement, part of the property comprised in which has been made the subject of a sub-settlement, should be entitled only in the matter of the original settlement, and served only on the trustees of that settlement. (*Re Knowles' S. E.*, 27 Ch. D. 707.)

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

For some remarks upon the distinctions between remainders and reversions, see Challis, R. P. 2nd ed. 67. This sub-section does not appear to refer to remainders or reversions existing previously to and independently of the settlement, but only to remainders and reversions separated off from the particular estate by the settlement itself. In practice, the sub-section will refer only to reversions, which are often confused with remainders.

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Where under a settlement the trustees take only an estate for their lives and that of the survivor, the reversion in fee left in the settlor is comprised in "the subject of the settlement" by virtue of this sub-section, and a person having the powers of a tenant for life under the Act can sell and make a good title to the fee simple. (*Re Hunter and Hewlett*, 1907, 1 Ch. 46.)

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

On the meaning of "land," see sub-s. (10) (i.), *infra*. The present sub-section does not define "land," but "settled land."

The powers conferred by the Act, so far as regards their exercise by a person who is in fact a tenant for life under a settlement, bind only such estate or interest as is comprised in the settlement. For example, the tenant for life of a term of years cannot grant a lease for a longer term than the residue of the settled term. But it must be remembered that in some cases the word "settlement" bears in this Act an artificial meaning. The undisposed-of reversion on a tenancy for life created by a will, is deemed to be included in the will, and the will is deemed to create a settlement, see sub-s. (2), *supra;* and such reversion would be bound by any exercise of the powers by the tenant for life. A similar remark applies to most of the limited owners who, by s. 58, p. 322, *post*, have the powers of a tenant for life. Nevertheless, the proposition is generally true, that no estate or interest will be bound, which could not have been bound by the settlor. This language does not, however, adequately apply to the case of a tenant by the curtesy. (See S. L. Act, 1884, s. 8, p. 347, *post*, and note thereon.)

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

This provision appears to have been originally enacted by 27 & 28 Vict. c. 45, s. 3, passed to amend the Settled Estates Act, 1856, in consequence of the decisions in *Re Goodwin's S. E.*, 3 Giff. 620, and *Re Birtles' S. E.*, 11 W. R. 739; in which it was held that the Court had no jurisdiction under the Settled Estates Act to sell land which under a settlement had devolved in numerous undivided shares, when the fee in some or all of the shares had become absolutely vested. (See the judgment of Stirling, J., in *Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. p. 354.) The provision seems here to serve no useful purpose, because the only cases to which it could be usefully applied have been provided for by s. 19 and s. 59, *post*, taken in conjunction with sub-s. (10) (i.), *infra*.

In *Re Ld. Stamford's S. E.*, 43 Ch. D., at p. 90, there is a remark by Stirling, J., upon this sub-section, which seems to be inconsistent with the hypothesis that in *Re Byng's S. E.*, 1892, 2 Ch. 219, the fact that the trusts of the two terms of years therein referred to had become satisfied before the question in dispute arose, was material to the decision; but North, J., by his remark at p. 225, seems to have treated that fact as being material. For a similar remark by Stirling, J., see also *Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. at p. 351. In an Irish case, *Re Bective Estate*, 27 L. R. Ir. 364, Porter, M.R., seems to have thought that, by virtue of this sub-section, land once settled remains so for ever, though the statutory powers may fall into a sort of abeyance for want of a tenant for life to exercise them.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

This includes both a legal and an equitable tenant for life in possession (see sub-s. (10) (i.), *infra*), and a person who has the right to reside in the mansion-house subject to extensive powers of management vested in the trustees. (*Re Baroness Llanover's Will*, *Herbert* v. *Freshfield*, 1902, 2 Ch. 679, affirmed 1903, 2 Ch. 16.) As to the other persons upon whom are conferred the powers of a tenant for life under the Act, see sects. 58, 60, 61, 62, *post*.

No power "exerciseable for any purpose provided for in this Act" can now be conferred by a settlement upon trustees, so as to be exercised by them without the consent of the tenant for life. See s. 56, sub-s. (2), p. 319, *post*. There can never be more than a single tenant for life, within the meaning of the Act, at the same time; though such a tenant for life may consist of several individual persons acting jointly. See sub-s. (6), *post*. If the tenant for life consists of more than one person, the consent of one of them will suffice; see S. L. A. 1884, s. 6, sub-s. (2), p. 343, *post*. If the tenant for life is an infant, it seems that such consent is to be given on his behalf by the trustees for purposes of the Act, who may be, but are not necessarily, the same as the trustees to exercise the power. (*Re D. of Newcastle's Estates*, 24 Ch. D. 129.) The same principle seems applicable to the giving of consents on behalf of lunatics.

As to the exercise of the statutory powers by a tenant for life who has incumbered his estate or interest under the settlement, see sub-s. (7), *infra*, and s. 50, and notes thereon, p. 312, *post*.

A trust to sell the life estate, coupled with a covenant on the part of the tenant for life not to retain the estate for life *in specie*, will not deprive the tenant for life of his statutory powers. (*Re Hale and Clark*, W. N. 1886, p. 65; 34 W. R. 624.)

If the heir-at-law becomes entitled practically for life, by reason

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of an indefinite direction for accumulation, after the period allowed by Thellusson's Act has expired, he is thenceforward tenant for life within the meaning of the Act. (*Re Atherton*, W. N. 1891, p. 85.) The executrixes of a deceased next of kin, and the surviving next of kin, if under the Thellusson Act they become entitled between them to the rents of real estate purchased out of personal property, which rents have been directed to be accumulated during a life which extends beyond the period allowed by the Act, can collectively exercise the powers of a tenant for life of the lands, either under this sub-section, or under s. 58, sub-s. (1) (v.), p. 325, *post*. (*Vine* v. *Raleigh*, No. 2, 1896, 1 Ch. 37. See, however, *Re Jemmett and Guest*, 1907, 1 Ch. 629.) Prolonged expenditure on improvements is not within the mischief of Thellusson's Act. (*Vine* v. *Raleigh*, No. 1, 1891, 2 Ch. 13.)

In the absence of special reasons to the contrary an equitable tenant for life is entitled to be let into possession and to have the custody of the title deeds. (*Re Wythes, West* v. *Wythes*, 1893, 2 Ch. 369. See also *Re Bagot's Settmt., B.* v. *Kittoe*, 1894, 1 Ch. 177; *Re Newen, N.* v. *Barnes*, 1894, 2 Ch. 297.) And this rule applies to a person who has the powers of tenant for life under the S. L. A., otherwise it would be difficult for him to exercise his powers under the Act. (*Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778; *Re Money Kyrle*, 1900, 2 Ch. 839.) But where land was purchased out of personalty under the provisions of a private Act which directed that the purchase-money was to be deemed a debt from the real to the personal estate, which debt was to be held by the trustees as part of the personalty and secured by a lien on the purchased land, the trustees were held entitled to the custody of the title-deeds of the land so purchased so long as their lien existed, although the tenant for life of both realty and personalty was identical. (*Wheeler* v. *Tootell*, 51 W. R. 693.)

Moreover the Court will allow the assignee of the estate of the tenant for life to be let into possession, although the Act does not enable him to exercise the powers of the tenant for life, as the expense of collecting the rents may thereby be saved. (*Re Hunt, Pollard* v. *Geake*, W. N. 1900, p. 65; W. N. 1901, p. 145.) But if the assignee is not a man of means, he may be ordered to give security. (*S. C.*)

Under a forfeiture clause the estate of an equitable tenant for life became suspended, until a certain charge had become satisfied under an implied trust to apply the income for that purpose. During the suspension the tenant for life can exercise the statutory powers, as coming within s. 58, sub-s. (vi.), p. 325, *post*. (*Williams* v. *Jenkins*, 1893, 1 Ch. 700.)

If parts of the settled estates are subject to mortgages paramount to the settlement, the tenant for life is bound to keep down the interest out of the income of the whole. (*Frewen* v. *Law Life Assce. Soc.*, 1896, 2 Ch. 511.) And a tenant for life of several estates included in the same devise remains liable, as between himself and the remaindermen, to make good arrears of interest accrued during his life tenancy out of subsequent rents received

by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property. (*Honywood* v. *Honywood*, 1902, 1 Ch. 347.)

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

The Act contains nothing to enable a majority, either of number or in value, of such joint tenants or tenants in common, to bind a dissentient minority; but under S. L. Act, 1884, s. 6, sub-s. (2), p. 343, *post*, the consent of one only is necessary to the exercise of powers conferred by the settlement.

The several persons who are the objects of a discretionary trust for distribution of rents and profits during the life of one of them, do not together constitute a tenant for life under the Act. (*Re Atkinson, A.* v. *Bruce*, 31 Ch. D. 577.) But where a will directed trustees to pay several life annuities out of the rents and profits and to divide the balance amongst the annuitants in shares proportionate to the amount of their annuities, it was held that the annuitants were entitled to the entire rents and profits and had together the powers of a tenant for life. (*Re Bennet*, 1903, 2 Ch. 136.)

If several persons constituting together the tenant for life are represented by separate solicitors in completing a sale made under the Act, they are all entitled to their separate costs. (*Smith* v. *Lancaster*, 1894, 3 Ch. 439.)

An undivided share of land separately comprised in a settlement is settled land for purposes of the Act. (See sub-s. (10) (i.), *infra*.) But where undivided shares are separately settled, the tenants for life of the undivided shares do not together constitute a tenant for life. (*Re Osborne and Bright*, 1902, 1 Ch. 335.)

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

See s. 50, p. 312, *post*, and s. 58, sub-s. (ix.), p. 327, *post*.

Where property is devised to trustees upon trust for the testator's widow for the benefit and maintenance of herself and her children, she has the powers of a tenant for life. (*Re Pollock*, 1906, 1 Ch. 146.)

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(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

The settlement by which the trustees are to be declared is the original settlement if any of the trusts and powers thereof are still subsisting, and not a re-settlement which is made subject to those trusts and powers. (*Re Spencer's S. E.*, 1903, 1 Ch. 75.) But where limited owners have under the original settlement joint absolute dominion over the property, and they re-settle it, restoring the subsisting uses, powers, and trusts of the original settlement, they may by such re-settlement declare who are to be the trustees of the compound settlement. (*Re Spearman's S. E.*, 1906, 2 Ch. 502.)

Trustees who have a power of sale for a limited purpose only are not trustees of the settlement for the purposes of the Act; what the Act contemplates is a general power. (*Re Coull's S. E.*, 1905, 1 Ch. 712.)

As to the necessity, when no trustees for the purposes of the Act exist, for procuring the appointment of such trustees, see note on s. 45, sub-s. (3), p. 306, *post*. As to the appointment of trustees, see s. 38, p. 299, *post;* and, where the tenant for life is an infant, s. 60, p. 330, *post*.

A trustee having a power of sale to arise *in futuro*, was not, under the present Act, a trustee for purposes of the Act. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.) But now, where there are no trustees under the present section, by the S. L. Act, 1890, s. 16, p. 363, *post*, the following persons are trustees:—

(a) Persons having a power of, or trust for, sale of any other land comprised in the settlement and subject to the same limitations; or
(b) With power of consent to the exercise of such a power of sale; or
(c) With a future power of, or trust for, sale; or
(d) With power of consent to the exercise of such a future power.

And it is immaterial that the trust or power is not exerciseable until after the death of one of the trustees. (*Re Jackson's S. E.*, 1902, 1 Ch. 258.)

With regard to consents, the word *trust* does not appear in the enactment in addition to the word *power*.

A trustee with a power of sale subject to the consent of the tenant for life is a trustee for purposes of the Act. (*Constable* v. *Constable*, 32 Ch. D. 233.) It has been held that if the

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consent of some other person which cannot be obtained is necessary, a fresh appointment of trustees must be made. (*Re Johnstone's Settmt.*, 17 L. R. Ir. 172.)

Trustees who hold land for a term of 1000 years upon trust by mortgage thereof, or by and out of the rents and profits thereof, or by any other reasonable ways or means to raise some specified sums of money, are not trustees for the purposes of the Act. (*Re Carne's S. E.*, 1899, 1 Ch. 324.)

When realty is settled by reference to trusts of personalty, trustees in whom the latter is vested, if they have a power to call in and vary investments, are trustees of the realty for purposes of this Act. (*Re Garnett Orme*, 25 Ch. D. 595.) And trustees of ground rents purchased under a power in the settlement, who have also a power to "vary securities," are trustees for the purposes of the Act. (*Re Tapp and London and India Docks Co.'s Contract*, 74 L. J. Ch. 523.)

So where personalty is given to trustees upon trust to invest in land to be held upon the trusts of settled land the purchased lands are comprised in the settlement within the meaning of s. 16 of the Act of 1890, and the trustees are trustees for the purposes of the Acts. (*Re Moore*, 1906, 1 Ch. 789.)

Trustees appointed expressly by the settlement as trustees for purposes of the Act, and not being such by virtue of any trust or power vested in them, are now within the statutory powers for the appointment of new trustees, and provisions ancillary thereto. (See the Trustee Act, 1893, s. 47, p. 428, *post*.)

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

See also s. 33, p. 287, *post*.

In some cases, methods by which capital money may arise are specifically mentioned. See s. 11; s. 18; s. 22, sub-s. (7); s. 31, sub-s. (ii.); s. 32; s. 33; s. 34; s. 35, sub-s. (2); and s. 37, *post*.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

The phrase "settled land," which in this Act, by virtue of sub-s. (3), *supra*, includes *any estate or interest* in land, of course includes a term of years.

Easements are not incorporeal hereditaments, but rights appurtenant to corporeal hereditaments. (See *Re Brotherton*,

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77 L. J. Ch. 58.) Rights created by statute and in their nature (that is, so far as regards the privileges which they confer) resembling easements, may sometimes exist apart from any corporeal tenement to which they are appurtenant; and such rights have sometimes been loosely styled easements. (See, for an example, *G. W. R.* v. *Swindon, &c. Rway.*, 22 Ch. D. 677, at p. 707.)

It was held in *Re Collinge's S. E.*, 36 Ch. D. 516, that the tenant for life of an undivided moiety of certain lands could not exercise the statutory power of sale, except with the concurrence of the owner of the other moiety. In a previous edition of this work it was submitted that this decision could not be defended, as the attention of the Court was not called to this sub-section, but only to sub-s. (6), *supra*, and s. 19, *post*; and this view has since been adopted by the Court of Appeal in *Cooper* v. *Belsey*, 1899, 1 Ch. 639.

It has been held by Chitty, J., in *Re Sir J. Rivett-Carnac*, 30 Ch. D. 136, that the phrase "incorporeal hereditaments" here includes a baronetcy. (See, further, on this case, note on s. 37, *post*.)

According to Jessel, M.R., in *Taylor* v. *Taylor*, L. R. 20 Eq. 297, 1 Ch. D. 426, a person entitled to be paid the net income received by trustees, is not a person entitled to receipt of rents and profits within the meaning of the Settled Estates Act, 1856, s. 32. James, L.J., in *S. C.*, 3 Ch. D. 145, at p. 146, rather questioned this opinion, while affirming the decision of Jessel, M.R., upon another ground. Perhaps s. 58, sub-s. (ix.), p. 327, *post*, makes the mention of income, as distinguished from rents and profits, superfluous.

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift.

The following kinds of rents or reservations are often found in mining leases:—

(1.) A fixed annual payment, being a rent commonly so called;

(2.) A surface rent, varying with the amount of surface land occupied for the purposes of the works;

(3.) A footage, or acreage, rent, varying both with the lateral extent and the thickness of the actual working;

(4.) Royalty, or galeage rent, varying with the amount of the minerals won; and

(5.) A wayleave rent, paid for the passage of minerals over other lands of the lessor; which is probably what is here meant by the word "toll."

The word toll (*tolnetum*) was in common use in the

time of Bracton (see lib. ii. cap. 24) to signify a tribute or custom paid for passage.

In some mines there is also found,

(6.) A spoil-bank rent, being a rent paid for land occupied by deposits of waste or rubbish.

It is also not uncommon to provide that royalties and other payments in respect of certain minerals may be made in kind; to which practice the provision in this section, "payment includes delivery," refers.

A mining lease may reserve an acreage rent with a minimum rent commencing in the second year and increasing year by year. (*Re Aldam's S. E.*, 1902, 2 Ch. 46.)

Several yearly rents may be reserved on one lease, and may be severally distrained for, and may severally be made the subject of a condition for re-entry. (See *Knight's Case*, 5 Rep. 54.)

Money paid to the tenant for life for his personal benefit as an inducement to him to grant a lease cannot be regarded as a fine. (*Chandler* v. *Bradley*, 1897, 1 Ch. 315.)

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

See *Re Earl of Ellesmere*, W. N. 1898, p. 18, as to what are "building purposes."

The Settled Estates Act, 1877, s. 4, 1st sub-division, *post*, distinguishes between building leases and repairing leases, fixing different extreme limits for their respective terms.

(iv.) Mines and minerals mean mines and minerals whether already opened or in work, or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

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The following substances are within the meaning of the term "minerals":—Arsenic; china, potter's, Dorsetshire, clay; also brick-clay (see *E. of Jersey* v. *Neath Poor Law Guardians*, 22 Q. B. D. 555); coal; copper; coprolites; fire-clay; free-stone; gold; granite; gravel; iron; lead; limestone; marble; silver; salt; slate; stratum of stone; stone in quarry; tin; umber; zinc. As to the comprehensiveness of the term, see *Hext* v. *Gill*, L. R. 7 Ch. 699; *Att.-Gen.* v. *Welsh Granite Co.*, 1 Times L. R. 549; *Great Western Railway* v. *Carpalla United Clay Co.*, 1909, 1 Ch. 218. Flints are, perhaps, no longer minerals when they have been turned up on agricultural land in the ordinary course of husbandry. (*Tucker* v. *Linger*, 8 A. C. 508.) And under particular circumstances the word "minerals" may be restricted in meaning. (*Att.-Gen. for I. of Man* v. *Mylchreest*, 4 A. C. 294; *Ld. Prov. of Glasgow* v. *Farie*, 13 A. C. 657; *Re Todd, Birleston & Co. and North-Eastern Railway Co.'s Arbitration*, 1903, 1 K. B. 603; *Staples* v. *Young*, 1908, 1 I. R. 135.)

Limestone worked from an open quarry is a mineral within the meaning of the Railways Clauses Act, 1845, ss. 77—79. (*Midland Rway. Co.* v. *Robinson*, 15 A. C. 19.) And letting down the surface is a mining purpose within the meaning of the above sub-section. (*Sitwell* v. *Earl of Londesborough*, 1905, 1 Ch. 460.)

(v.) Manor includes lordship, and reputed manor or lordship:

See note on Conv. Act, 1881, s. 2, sub-s. (iv.), p. 12, *ante*.

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

See note on Conv. Act, 1881, s. 2, sub-s. (xii.), p. 14, *ante*.

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

See s. 48, p. 309, *post*.

(xi.) Person includes corporation.

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

S. L. A. 1882, Sect. 3.

Powers to tenant for life to sell, &c.

3. A tenant for life—

As to the duties and liabilities of a tenant for life, in exercising these and the other powers conferred by the Act, see s. 53, p. 316, *post*, and note thereon.

As to what costs will, under the Solicitors' Remuneration Act, 1881, Gen. Ord. r. 4, be allowed to the solicitor conducting a sale, see *Re Beck*, 24 Ch. D. 608.

A tenant for life may exercise his statutory powers without the sanction of the Court, although an order has been made for administration of the trusts of the settlement. (*Cardigan* v. *Curzon-Howe*, No. 1, 30 Ch. D. 531. See also, *Re Mansel, Rhodes* v. *Jenkins*, 33 W. R. 727.)

As to cases in which an order for sale has been already made under the Settled Estates Act, 1877, see note on s. 56, p. 321, *post*.

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

A sale by the remainderman of his interest, made before the passing of this Act, will not hinder the tenant for life from exercising this power of sale. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.)

Speculative expectations of a future increase in value of the estate afford no ground for restraining a sale on the application of the remainderman. (See *Thomas* v. *Williams*, 24 Ch. D. 558.)

Costs of an unsuccessful attempt to sell are payable out of capital moneys, and may, if no such moneys are available, be raised by mortgage. (*Re Smith's S. E.*, 1891, 3 Ch. 65.)

As to estates, interests, and charges to which the powers conferred by the Act are subject, see s. 20, sub-s. (2), *post*.

As to the principal mansion-house, &c., see S. L. Act, 1890, s. 10, p. 355, *post*.

A tenant for life has been allowed to sell the subsoil, without the surface, to a railway company for the purposes of a tunnel (*Re Pearson's Will*, 83 L. T. 626.)

As to a separate sale of the minerals, see s. 17, p. 247, *post*.

A tenant for life may, under a power of sale in the settlement, sell to a trustee for himself. (*Bevan* v. *Habgood*, 1 J. & H. 222.) Under this Act he cannot grant a lease to himself and others, because the covenants would not be binding in law, and, *semble*, he could not grant it to a trustee for himself. (*Boyce* v.

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Edbrooke, 1903, 1 Ch. 836.) Now, by S. L. Act, 1890, s. 12, p. 359, *post*, on a sale to or purchase from the tenant for life, the trustees can exercise the statutory powers.

Before the Act, when the trustees had a power of sale, the sale was in practice usually made by the tenant for life; and the contract was often executed by him alone, before any communication was made to the trustees. (See the remarks of Jessel, M.R., in *Forster* v. *Abraham*, L. R. 17 Eq. 351, at p. 355.)

Where a power of sale is given to trustees by a private Act of Parliament, the tenant for life may exercise his statutory power free from any restriction imposed on the power given to the trustees. (*Re Chaytor's S. E. Act*, 25 Ch. D. 651.) It would seem that a sale made by a person who in fact has the powers of a tenant for life, but who believes himself to be absolute owner, and who purports to sell in the latter capacity, is valid, if it is such as might have been made under the statutory power. (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382.) That case referred to a lease; but the principle seems to be the same.

As to the creation of easements, see note on Conv. Act, 1881, s. 62, p. 158, *ante*.

As to the reservation and grant of easements, and as to the exchange of lands or easements for other lands or easements, upon an exchange or partition, see S. L. Act, 1890, s. 5, p. 353, *post*.

A tenant for life of land in Ireland, who has contracted in exercise of his statutory power to sell the fee simple, is entitled to present a petition for sale as a vendor under the Landed Estates Court Act, s. 47. (*Re Mahon's Estate*, 1896, 1 I. R. 273.)

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

The seignory of freehold land is not an estate, but a hereditament in which estates may subsist. It is not necessarily held for a fee simple; for manors having ancient freehold tenancies might, and often did, pass to the Crown by escheat or forfeiture, and might be, and often were, granted out for a fee tail, the reversion in fee simple remaining in the Crown. Some manors

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are probably so held at the present day, though lapse of time may have rendered the title obscure; and of them the seignory is held for a fee tail.

On a sale of the seignory of freeholds to the tenant, the seignory is extinguished, because "one man cannot of the same land be both lord and tenant." (Co. Litt. 152 b.) The object of extinguishing the seignory is the consequent destruction of the services, including chief rents, incident to the tenure.

As to the enfranchisement of copyholds by limited owners of manors, see the Copyhold Act, 1894, s. 43.

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

As to exchanges of settled land in England, see s. 4, sub-s. (8), *post*.

Now, by virtue of S. L. Act, 1890, s. 5, p. 353, *post*, easements may be reserved or granted, and lands or easements may be exchanged for lands or easements, on an exchange or partition.

On an exchange made with the tenant for life, the trustees can now exercise the statutory powers, under S. L. Act, 1890, s. 12, p. 359, *post*.

Quære, whether an exchange of the release of easements can be carried out under the Act. But such an arrangement may be effected by cross sales of the easements. (*Re Brotherton's Estate*, W. N. 1908, p. 56.)

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

See note to s. 2, sub-s. (6), *ante*, which provision refers both to joint tenants and tenants in common. The present subsection refers only to the latter.

Sect. 19, p. 248, *post*, perhaps refers only to the exercise of the other powers conferred by the Act.

On a partition with the tenant for life, the trustees can now exercise the statutory powers, under S. L. Act, 1890, s. 12, p. 359, *post*.

Sect. 4. Regulations respecting

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

In *Wheelwright* v. *Walker* (No. 2), W. N. 1883, p. 154, an

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sale, enfranchisement, exchange, and partition.

injunction was obtained by a purchaser from a remainderman, who had sold his interest before the commencement of the Act, to restrain the tenant for life from subsequently selling at a less value than the purchaser was himself willing to give.

A tenant for life cannot agree to sell at a price to be fixed by an arbitrator. But where such agreement has been confirmed by a private Act of Parliament, it will bind all persons interested in the settled land, though they were not mentioned in the Act. (*Re Earl of Wilton's S. E.*, 1907, 1 Ch. 50.)

On sales in consideration of a perpetual rent-charge, see now S. L. Act, 1890, s. 9, p. 355, *post*.

The Glebe Lands Act, 1888, 51 & 52 Vict. c. 20, s. 8, sub-s. (4), confers upon incumbents the statutory power of sale of a tenant for life.

The Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, s. 74, sub-s. (1), replacing the Housing of the Working Classes Act, 1885, s. 11, sub-s. (1), enacts that sales, exchanges, and leases may be made under S. L. Act, 1882, for the erection of dwellings for the working classes, for such consideration as can reasonably be obtained for that purpose.

See also S. L. Act, 1890, s. 18, p. 364, *post*, which enlarges the meaning of the phrase "working classes."

The Small Holdings and Allotments Act, 1908, 8 Edw. 7, c. 36, s. 40, sub-s. (4), enables a tenant for life to sell, exchange, or lease to a county council for purposes of that Act, for such consideration as for the purpose can reasonably be obtained. Sub-s. (5) enables grants in perpetuity at a fee farm rent to be made to a county council for the like purposes.

The above enactments, other than S. L. Act, 1890, s. 18, are printed in Appendix II., *post*.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

As to persons in a fiduciary position selling under needlessly depreciatory conditions, see notes to Conv. Act, 1881, s. 3, sub-s. (11), p. 24, *ante*, and Trustee Act, 1893, s. 14, p. 399, *post*. As to the fiduciary position of the tenant for life, see s. 53, p. 316, *post*.

(6.) On a sale, exchange, or partition any restriction or reservation with respect to building on or

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other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

It will probably be held that this sub-section was intended to enable the tenant for life to impose upon any part of the settled land remaining subject to the settlement, restrictions which will be binding upon remaindermen and reversioners to the same extent as if they had been imposed by an absolute owner, subject to the rights of incumbrancers, if any; as to which, see s. 20, sub-s. (2), p. 250, *post*.

On a sale of land on which under this sub-section restrictive covenants are imposed for the benefit of the unsold settled estate, the tenant for life has no power to give the purchaser an option at any future time to obtain a release of the covenants. (*Palmer* v. *Grand Junction Waterworks Co.*, 86 L. T. 352.)

As to restrictive covenants, see note on Conv. Act, 1882, s. 3, sub-s. (2), p. 188, *ante*.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

Enfranchisement extinguishes at law all rights of common in wastes, &c., of the manor, which before the enfranchisement were appurtenant to copyholds, because they appertain to the customary estate; and at law such extinguishment ensues, even though the enfranchisement purport to be made to the tenant "with all commons." (*Darson* v. *Hunter*, Noy, 136; *Fort* v. *Ward*, Serj. Moore's Rep. 667.) As to customary freeholds, see *Baring* v. *Abingdon*, 1892, 2 Ch. 374.

But there is no extinguishment in equity. (*Styant* v. *Staker*, 2 Vern. 250.) It has long been the usual practice in voluntary enfranchisements to insert a re-grant of such commons, and the practice will probably be retained, though the Judicature Acts seem to have made it less necessary than it previously was. By the Copyhold Act, 1894, s. 22, replacing the Copyhold Act, 1852, s. 45, which repeated a similar provision in s. 81 of the Act of 1841, such commons are preserved after enfranchisement under that Act. Enfranchisement does not affect easements. (Scriv. Cop. ch. xiv.) Nor does it affect common of pastures

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in wastes which, though belonging to the lord, are out of the manor; because such common belongs to the land, and not to the estate. (*Crowder* v. *Oldfield*, 1 Salk. 170; and see *S. C.* at p. 366; 2 Ld. Raym. 1225.)

(8.) Settled land in England shall not be given in exchange for land out of England.

20 Geo. 2, c. 42, s. 3.

By 20 Geo. 2, c. 42, s. 3, it is enacted, "that in all cases where the kingdom of England, or that part of Great Britain called England, have been or shall be mentioned in any Act of Parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the dominion of Wales, and the town of Berwick-upon-Tweed." This enactment was probably superfluous. (1 Bl. Com. 99.)

Special Powers.

Sect. 5. Transfer [*i.e.*, *shifting*] of incumbrances on land sold, &c.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

See s. 24, sub-sects. (4), (5), p. 267, *post*.

"Incumbrance" of course here includes only incumbrances which are not defeasible by the exercise of the powers; as to which, see s. 20, sub-s. (2)(ii.), p. 251, *post*, and s. 50, sub-s. (3), p. 312, *post*. The word includes a rent-charge created under the Improvement of Land Act, 1864. (*Re E. of Strafford and Maples*, 1896, 1 Ch. 235.) It would seem that such incumbrances might, on a *sale*, be discharged by the method provided in s. 5 of Conv. Act, 1881, p. 26, *ante;* but capital moneys could be applied for the purpose only in cases where the incumbrances could lawfully be discharged out of capital moneys. See note to s. 21 (ii.), p. 255, *post*.

Since the tenant for life in exercising his powers is a trustee for all parties (s. 53, p. 316, *post*), and a trustee cannot in exercising powers give an advantage to one beneficiary at the expense of another, it seems clear that the tenant for life could not shift an incumbrance from one part of the settled land to another part going in remainder to a different person, so as to prejudice the

latter; even if all parts constituted one settled estate, which seems not to be the case. See note on s. 2, sub-s. (1), p. 210, *ante*.

S. L. A. 1882, Sect. 5.

IV.—Leases.

General Powers and Regulations.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

Sect. 6. Power for tenant for life to lease for ordinary or building or mining purposes.

By S. L. Act, 1890, s. 7, p. 354, *post*, a lease not exceeding twenty-one years, without fine and subject to waste, may be made, without giving any notice under s. 45, p. 305, *post*, and notwithstanding that there are no trustees for purposes of the Acts.

When a lease given by a tenant for life does not comply with the provisions of the Act, *quære* whether it is void or only voidable. (*Re Handman and Wilcox*, 1902, 1 Ch. 599.)

A lease made by a person who believes himself to be absolute owner, but who, in fact, has the powers of a tenant for life, if it is such as might have been made under the statutory power, will take effect as an exercise of the power; and a subsequent contract for the sale of the lease may be specifically enforced against the purchaser, although it appears that, when the lease was granted, there were no trustees for purposes of the S. L. Acts. (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382.)

The Act authorizes a tenant for life to grant a lease containing an exception of mines and minerals. (*Re Gladstone, Gladstone* v. *Gladstone*, 1900, 2 Ch. 101, overruling *Re Newell and Nevill's Contract*, 1900, 1 Ch. 90; *Re D. of Rutland's S. E.*, 1900, 2 Ch. 206.) And it may include a grant of a wayleave for foreign minerals (*Re Aldam's S. E.*, 1902, 2 Ch. 46), and a right to let down the surface. (*Sitwell* v. *Earl Londesborough*, 1905, 1 Ch. 460.)

Where under a settlement made prior to 1882 the tenant for life has a wider power of leasing mines than that conferred by the Act, and after 1882 he grants a lease "in exercise of every power or authority enabling him in that behalf," he will be presumed to have executed the power under the settlement, and the statutory restrictions will therefore not apply. (*E. of Lonsdale* v. *Lowther*, 1900, 2 Ch. 687.) The power may be exercised by a tenant for life who has aliened his life estate. (*S. C.*)

(i.) In case of a building lease, ninety-nine years:
(ii.) In case of a mining lease, sixty years:

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(iii.) In case of any other lease, twenty-one years.

Leases to be derived out of leaseholds comprised in the settlement will be bounded by the term out of which they are derived; and leases of copyholds must conform to the custom of the manor.

A tenant for life cannot, it is conceived, properly comprise in a single lease properties having the same life estate but different remainders. Such properties seem to be different settled estates, though they may be comprised in the same instrument. (See note on s. 2, sub-s. (1), p. 210, *ante*. Compare *Tolson* v. *Sheard*, 5 Ch. D. 19.) At any rate the rents, covenants, &c., ought to be apportioned.

A tenant for life may, under a power in the settlement, lease to a trustee for himself. (*Bevan* v. *Habgood*, 1 J. & H. 222.) It is at least doubtful whether he might under this Act. He certainly cannot grant a lease to himself. (*Boyce* v. *Edbrooke*, 1903, 1 Ch. 836.) S. L. Act, 1890, s. 12, p. 359, *post*, suggests that, before its enactment, he could not lawfully have sold to, or exchanged or made partition with, himself.

Upon the discretion of the tenant for life, as to the insertion of covenants, compare *Davies* v. *D.*, 38 Ch. D. 499.

Payments made under a parol licence are in the nature of rent. (*Ex pte. Hankey*, Mont. & Mac. 247.)

As to leases with option of purchase, see note on s. 31, sub-s. (1), p. 282, *post*.

The statutory power of the tenant for life does not destroy, or make incapable of exercise, similar powers given to trustees (*Re D. of Newcastle's Estates*, 24 Ch. D. 129); but such powers cannot be exercised without the consent of the tenant for life. (See s. 56, sub-s. (1), p. 319, *post*.)

Leases granted under this section are subject to the rights of incumbrancers paramount to the settlement. But it is conceived that the tenant for life of a settled equity of redemption in a fee simple, while in possession, can grant leases, under s. 18 of the Conv. Act, 1881, p. 77, *ante*.

The tenant for life cannot, without obtaining the prescribed licence, grant valid leases of land comprised in the settlement only for a leasehold interest which is liable to forfeiture upon assignment or sub-letting without licence. See Conv. Act, 1881, s. 14, sub-s. (6), (i.), p. 68, *ante*.

As to leases of the mansion-house, &c., see S. L. Act, 1890, s. 10, p. 355, *post*.

Though an equitable tenant for life can grant leases under this section, it does not appear that he has any power to distrain for the rent reserved by them. It is conceived that proceedings by distress, being a remedy incidental to the legal reversion, must be taken in the name of the trustees in whom the legal estate is vested.

Where a lease was agreed to be granted to a tenant for life in remainder, it was held that the leasehold interest did not merge in the life estate when the intended lessee became

tenant for life in possession, no merger being intended. (*Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368.)

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7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

Sect. 7. Regulations respecting leases generally.

By S. L. Act, 1890, s. 7, sub-s. (iii.), the lease may be under hand only, if the term does not exceed three years, and the other prescribed conditions, as to fine and waste, are fulfilled.

Before a lease in possession can be granted, an existing lease must be surrendered (*Campbell* v. *Leach*, Amb. 740), unless it has not more than a year to run. It was held by Malins, V.-C. (*Re Ford's S. E.*, 8 Eq. 309), that a lease might be authorized under the Settled Estates Act, as a lease taking effect in possession, upon the surrender of an existing lease, although an underlease granted by the surrendering lessee was unexpired. The decision was apparently based upon the provisions of 4 Geo. 2, c. 28, s. 6, which make such an underlease take effect as if it had been granted out of the new lease. But if the old lease was granted at a lower rent than such as might be obtained on the granting of the new lease, or contained no condition for re-entry, it is difficult to see how the requirements of s. 7 of the S. L. Act, 1882, are to be complied with in such a case, and the decision of the Vice-Chancellor must be considered as open to review, unless its age and the number of titles that may have been accepted on the strength of it render it free from attack.

It would be inconsistent with this section to insert a covenant for renewal. (See *Re Farnell's S. E.*, 33 Ch. D. 599.) And it is doubtful whether a tenant for life can properly assent to any unusual stipulations in a lease, such as permitting the lessee to make alterations in the structure (other than building improvements, which would constitute a building lease; see note on s. 8 at p. 234, *post*), coupled with a covenant to reinstate the structure at the expiration of the term.

A lease which purports to be granted under the statutory power, but is void for containing a grant of easements over the demesne lands attached to the principal mansion, cannot be enforced, under 12 & 13 Vict. c. 26, as a contract for a lease *minus* the easements. (*Dowager Duch. of Sutherland* v. *D. of Sutherland*, 1893, 3 Ch. 169.) (And see *Re Newell and Nevill's Contract*, 1900, 1 Ch. 90, overruled on another point in *Re Gladstone, G.* v. *G.*, 1900, 2 Ch. 101.) In 1893, 3 Ch., p. 196, the question was referred to, but not decided, whether a husband can grant a lease, under the statutory power, to his wife. And it has since been held that he can. (*Gilbey* v. *Rush*, 1906, 1 Ch. 11.)

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to

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any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

As to best rent, see note on Conv. Act, 1881, s. 18, sub-s. (6), p. 80, *ante;* and see also the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, s. 74, sub-ss. (1) and (2), printed in Appendix II., *post.* And see note to s. 2, sub-s. (10) (ii.), p. 220, *ante.*

Money paid to the tenant for life for his personal benefit, as an inducement to him to grant the lease, cannot be regarded as a fine, and the rent reserved by a lease so granted cannot be considered as "the best rent," even though there is no evidence that a better rent could be obtained: consequently a lease granted under these circumstances is void. (*Chandler* v. *Bradley*, 1897, 1 Ch. 315. And see *Re Handman and Wilcox*, 1902, 1 Ch. 599.)

In the case of building (or mining) leases, "best rent" may be calculated with regard to sums laid out by the tenant in improvements. (See *Shannon* v. *Bradstreet*, 1 Scho. & Lef. 52, at p. 73; *Doe* v. *Bettison*, 12 East, 305, at p. 308.)

Voluntary expenditure by a lessee cannot be regarded as "money laid out" within this sub-section; which refers only to money laid out under the contract between the parties. (*Re Chawner's S. E.*, 1892, 2 Ch. 192.)

If the tenant for life has incumbered his life estate, he cannot take a fine on granting a lease, without the consent of the incumbrancer. (See s. 50, sub-s. (3), p. 312, *post.*)

Fines received under the Act for purposes of the settlement may be divided into,—

(1) Fines received on the renewal of a lease of settled land, of which the lessee could compel a renewal; as to which, see s. 12, sub-s. (ii.), p. 241, *post.*

(2) Fines received on the renewal of a lease previously made by the tenant for life under the Act, and containing a covenant to renew,—assuming that such a covenant could be inserted into a lease made under the Act, with the assent of the Court under s. 10, p. 236, *post.*

(3) Fines received on the grant of a lease *de novo* under the Act.

Fines of the class (1) are casual profits, to which the tenant for life is entitled. (*Brigstocke* v. *Brigstocke*, 8 Ch. D. 357.) They seem to be closely analogous to fines and heriots received on admission to copyholds, when the settlement comprises a manor, which are payable to the tenant for life. (And see *Re Medows, Norie* v. *Bennett*, 1898, 1 Ch. 300.) They do not pass under an appointment of the land by the tenant for life under a power. (*Re Moses, Beddington* v. *B.*, 1902, 1 Ch. 100, affirmed *sub nom. Beddington* v. *Baumann*, 1903, A. C. 13.)

Fines of classes (2) and (3) would seem, upon general principles, to be capital money arising under the Act. And

now, by the S. L. Act, 1884, s. 4, p. 341, *post*, provision is made to that effect. S. L. A. 1882, Sect. 7.

As to the apportionment of fines *paid* for renewing renewable leaseholds comprised in the settlement, see note on the Trustee Act, 1893, s. 19, p. 403, *post*.

As to the application of fines taken on the granting of mining leases, see note on s. 11, p. 238, *post*.

If fines are temporarily invested, pending their permanent investment, they will not be deemed to be "applied as productive capital on which a profit has arisen or will arise otherwise chargeable under" the Act, within the meaning of the Income Tax Act, 1842, 5 & 6 Vict. c. 35, s. 60, Sched. (A.), No. II., r. 5, so as to give a right to the exemption there referred to. (*Ld. Mostyn* v. *London*, 1895, 1 Q. B. 170.)

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

The covenant must be enforceable at law. Consequently a lease by a tenant for life to himself and others is void, as the covenants therein are not binding in law. (*Boyce* v. *Edbrooke*, 1903, 1 Ch. 836.)

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

As to counterparts to leases, see Fawcett, Landl. & Ten. ch. iii. sect. (ii.), (5); Woodfall, Landl. & Ten. ch. v. sect. 2.

(5.) A statement contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee, and of those claiming under him, be sufficient evidence of the matter stated.

This sub-section seems to refer to matters of fact or calculation such as are specified in sub-s. (2), *supra*; s. 8, sub-s. (3) and s. 13, sub-s. (5), *post*.

Building and Mining Leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person Sect. 8. Regulations respecting

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building leases.

by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

As to the meaning of building lease, see s. 2, sub-s. (10), (iii.), p. 221, *ante*.

Building leases and building agreements may now contain an option for the lessee to purchase. (See S. L. Act, 1889, s. 2, p. 351, *post*.)

On grants in fee simple for building purposes, in consideration of a perpetual rent-charge, see S. L. Act, 1890, s. 9, p. 355, *post*.

The present sub-section provides that a *repairing* lease—*i.e.*, a lease containing a covenant to *put* in repair, not merely to *keep* in repair, existing buildings—shall be a *building* lease. (Compare *Doe* v. *Withers*, 2 B. & Ad. 896, and *Truscott* v. *Diamond, &c. Co.*, 20 Ch. D. 251.) The powers in these two cases appear to have been framed with very different intentions, and the cases are, as was admitted by Jessel, M.R., in no way inconsistent one with the other. His depreciatory remarks upon *Doe* v. *Withers* seem to have been quite uncalled for.

As to past expenditure regarded as a consideration, see note on Conv. Act, 1881, s. 18, sub-s. (9), p. 81, *ante*. Past voluntary expenditure by the lessee will not justify the tenant for life in granting a lease under this section at less than the best rent mentioned in s. 7, sub-s. (2), *ante*. (*Re Chawner's S. E.*, 1892, 2 Ch. 192.)

A building lease may be made partly in consideration of the lessee undertaking to lay out a fixed sum upon repairs and improvements. (*Re Daniell's S. E.*, 1894, 3 Ch. 503.)

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents

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which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

This sub-section practically provides that the value of the buildings erected under a building lease or agreement must be at least four times that of the land on which they stand.

In *Re Sabin's S. E.*, W. N. 1885, p. 197, a tenant for life granted a building lease of land in plots at a total rent of 100*l.* *per annum*. Buildings were erected on about one fifth part of the land, and leased at ground rents amounting altogether to 99*l.* 10*s.* *per annum*, and the remainder of the land was leased at a ground rent of 10*s.* *per annum*. The tenant for life afterwards proposed to sell the reversion of the last-mentioned land for 17*l.*; and Pearson, J., granted an injunction to restrain him from carrying out the sale, on the ground that the lease was not, in his opinion, a proper building lease within the Act. The lessee was not represented before the Court, and the judge did not finally decide that the lease was bad. It certainly seemed to be an improper use of the power, but it is difficult to make out that it did not come within the limits of the section. Probably it was considered an improper exercise of a discretion vested in a quasi-trustee.

In cases where, owing to the circumstances of the locality, a proportion not in accordance with this rule is contemplated, it will be necessary either to apply to the Court under s. 10, sub-s. (1), *post*, or under the Settled Estates Act, 1877, which contains no such restriction.

Sect. 9. Regulations respecting mining leases.

9.—(1.) In a mining lease—

The rent may now be made to vary according to the price from time to time of the minerals gotten. (See S. L. Act, 1890, s. 8, p. 354, *post*.)

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land,

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or by or according to any facilities given in that behalf; and

The words, "or any other land," refer to adjacent mines worked through mines in settled land by way of outstroke.

The provision about "facilities" seems by implication to empower the tenant for life to grant, or make allowance or provision for, such facilities in connection either with his own or a neighbouring mine.

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

As to the different kinds of rents in mining leases, see note to s. 2, sub-s. (10) (ii.), p. 220, *ante*.

Sect. 6, p. 229, *ante*, enables the tenant for life to grant wayleaves (*Re Aldam's S. E.*, 1902, 2 Ch. 46), and the right to let down the surface. (*Sitwell* v. *Earl Londesborough*, 1905, 1 Ch. 460.)

The Settled Estates Act, 1877, s. 4, permits a peppercorn rent, or any smaller rent than the rent which is ultimately made payable, to be made payable during any part of the first five years of a mining lease. The absence of a similar provision from this section does not, however, prevent the reservation of a minimum rent which is not uniform, and does not commence from the first day of the term, and the rent may be either an increasing or a diminishing one. (*Re Aldam's S. E.*, 1902, 2 Ch. 46.)

As to the apportionment between capital and income of rents reserved by mining leases, made under the Act, see s. 11, *post*.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes.

Sect. 10. Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining

purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

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(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

It is conceived that a tenant for life is, under the general power, entitled to grant mining leases containing stipulations usual in the district in which the mine is situated. This section enables the Court to authorize the insertion of powers which could not strictly be called necessary, *e.g.*, to build workmen's cottages. (See *Morris* v. *Rhydydefed Colliery Co.*, 3 H. & N. 885.)

For an example of an extended term being granted under the similar provision contained in the 19 & 20 Vict. c. 120, s. 2, re-enacted by the Settled Estates Act, 1877, s. 4, see *Re Cross's Charity*, 27 Beav. 592.

It is apprehended that, before the Court will consent to authorize the tenant for life generally to make such extended or different leases, a clear local custom must be shown to exist. In such cases a model lease will not ordinarily be required. (See the S. L. Act Rules, 1882, r. 9, *post;* which also see as to leases authorized in particular cases.)

It is possible that, on proof of a local custom, the Court would authorize the tenant for life to grant leases containing a covenant

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for renewal. If such a covenant were inserted by the tenant for life without the assent of the Court, it would be binding during his lifetime upon himself and purchasers from him with notice (*Taylor* v. *Stibbert*, 2 Ves. 437); unless in cases where the land remains in the settlement and the performance of the covenant can be shown to be injurious to the inheritance.

In Ireland a building lease for five hundred years has been authorized under this section. (*Re O'Connell's Estate*, 1903, 1 I. R. 154.)

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms III., IV., and V., *post*.

Sect. 11. Part of mining rent to be set aside as capital.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

If lands are taken by a railway company, without the minerals, under a special Act of Parliament (which seems to have embodied the Lands Clauses Act, 1845), and the tenant for life subsequently gives notice of his intention to work the minerals, which are then purchased by the railway company, and conveyed by the tenant for life under his statutory powers, he, though without impeachment of waste, is not entitled to any apportioned part of the price paid for the minerals, though he could, and probably would, have worked them out if they had not been sold. (*Re Robinson's Settmt. Tr.*, 1891, 3 Ch. 129.)

At common law a tenant for life, though impeachable for waste, may work mines (including quarries) already opened. It follows that he may lease them for his own life, or for years determinable with his life. As to the question whether a lease so made would be valid against a lessee claiming under a subsequent lease made by the same tenant for life in exercise of his statutory power, see note on s. 50, at p. 313, *post*.

He may also open a new seam in an old mine, though such seam requires to be approached by a new shaft. (*Spencer* v. *Scurr*, 31 Beav. 334; *Clavering* v. *C.*, 2 P. Wms. 388; and see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, at p. 466.) As to what is a new mine, see *Re Maynard's S. E.*, 1899, 2 Ch. 347.

The question whether he may reopen a disused mine seems to depend upon whether the working was discontinued by the owner of the inheritance, with a view to some advantage to the

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property. (*Bagot* v. *B.*, 32 Beav. 509, at p. 517.) It seems that he may, if the discontinuance is of recent date and apparently not made with some permanent object.

But he may not work for commercial profit a mine which has been opened only for a more restricted purpose: *per* Selborne, L.C., in *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, at p. 465.

Dower is due out of open mines (*Stoughton* v. *Leigh*, 1 Taunt. 402); and, perhaps, out of mines opened after the husband's death before the dower has been assigned. (*Dicken* v. *Hamer*, 1 Dr. & Sm. 284.)

The tenant for life is entitled, though impeachable for waste, to the whole income on a lease contracted to be granted by his testator, who was absolute owner. (*Re Kemeys-Tynte*, 1892, 2 Ch. 211.)

If a lease is granted under the statutory power, the lessee must generally have notice of the settlement; and in such mining leases as involve the outlay of capital by the lessee, it is often prudent to investigate the lessor's title. It is conceived that the lessee must pay the portion of the rent which is to be set aside as capital either to the trustees or into Court, as directed by s. 22, *post*, and that the trustees ought to see this arrangement carried into effect. But it is not easy to see by what title the trustees could recover any part of the rent from the lessee, if the lease were granted by a legal tenant for life, unless they are made parties to the lease; which, however, might of course be granted without their concurrence.

The present section contains nothing to hinder a tenant for life, even though impeachable for waste, from working opened mines, either personally or under any lease not granted by virtue of the Act, and receiving the whole profits or rents as income. If he be unimpeachable for waste, the same remark applies to unopened mines. And any fine taken on the granting of any lease which he is able to grant at common law will belong wholly to him. The same remark applies to leases made under a power in the settlement, unless the settlement provides that fines shall be treated wholly or partly as capital. A power authorizing him to grant leases on such terms "as he shall think fit," or "as shall seem reasonable and proper," is an arbitrary power, and will enable him, if unimpeachable for waste, to take a fine and appropriate it to his own use. (*Mostyn* v. *Lancaster*, 23 Ch. D. 583.)

But a lease purporting to be granted in exercise of a power will not, if void as an exercise of the power, take effect out of the estate (if any) of the donee of the power (see *Roe* v. *Archbp. of York*, 6 East, 86); unless for some special reason it should appear to be the intent of the parties that the lease should take effect *quâcunque viâ*.

Sale moneys of gravel, loam, peat, &c., sold by the trustees of a will in continuance of a custom pursued by the testator, have been held to belong to the tenant for life. (*E. Cowley* v. *Wellesley*, 35 Beav. 635, at p. 639.) And see *Cardigan* v.

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Curzon-Howe, 14 T. L. R. 550, as to compensation paid by railway company for not working mines.

So, too, royalties derived from brickfields, part of which had been leased by a testator, and the other part by his trustees in pursuance of an arrangement made by the testator, and in exercise of a power of leasing contained in his will. (35 Bea. at p. 638.)

If a severance should take place between the mines and the surface, previous arrears of the mineral rent set aside will, in the absence of appointment to the contrary, follow the destination of the surface. (*Re Scarth*, 10 Ch. D. 499.)

For examples of a "contrary intention expressed in a settlement," see *Re D. of Newcastle's Estates*, 24 Ch. D. 129; *Re Bagot's Settlement*, 1894, 1 Ch. 177.

Where a mining lease reserves a rent payable in kind, a part of this must be "set aside as capital money." If such part should require to be paid into Court, the lessee should add to the summons taken out under Rule 10, an application for directions to convert.

There is nothing in the Act to forbid the taking of a fine on the grant of a mining lease any more than on the grant of any other lease. The fine will, of course, be capital money; see S. L. Act, 1884, s. 4, p. 341, *post*, and *Re Aldam's S. E.*, 1902, 2 Ch. 46.

A person entitled for life to the income of land until sale, and afterwards to the income of the proceeds of sale, though he cannot strictly be described as impeachable for waste, is impeachable for waste within the meaning of this section. (*Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504.) But the settlement need not expressly declare the tenant for life to be unimpeachable for waste in order to prevent him from coming within the description of "impeachable for waste in respect of minerals." (*Re Chaytor*, 1900, 2 Ch. 804.)

Special Powers.

Sect. 12. Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

In this sub-section the phrase, "predecessors in title," seems to include both the settlor and the persons who take beneficially in succession under the settlement in priority to the tenant for life for the time being. "Successors in title," seems to be used to denote persons taking beneficially under the settlement, whose interests are subsequent to that of the tenant for life for the time being; though such persons are not in fact successors

in the title of such tenant for life, but severally derive their title from the settlor. S. L. A. 1882, Sect. 12.

In the case of a contract for a lease entered into previously to the settlement by a settlor absolutely entitled, of which the provisions are in excess of the power conferred by s. 6, p. 229, *ante*, this section empowers the tenant for life to carry out the contract. Previously, it would have been necessary either to submit to a decree for specific performance, or to obtain a private Act of Parliament. (*Cust* v. *Middleton*, 3 De G. F. & J. 33.)

A lease made in pursuance of a contract under this provision, is not within s. 11, *ante*. (*Re Kemeys-Tynte*, 1892, 2 Ch. 211.)

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

As to the destination of fines receivable upon such renewals, see note on s. 7, sub-s. (2), p. 232, *ante*.

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

This sub-section seems to empower the tenant for life to correct only defects in point of form, or of title at the time of the grant. It does not appear that he has under this sub-section power to give a gratuitous benefit to the holder of the void or voidable lease, but only to give him such rights as he could enforce against the settlor's estate, either by virtue of 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, or else by virtue of covenants for title contained in a void or voidable lease purporting to be made by an absolute owner. See *Re Newell and Nevill's Contract*, 1900, 1 Ch. 90, overruled on another point in *Re Gladstone, G.* v. *G.*, 1890, 2 Ch. 101.

It would also seem that for such a confirmation, any notice which, by virtue of s. 45, p. 305, *post*, as modified by S. L. Act, 1884, s. 5, p. 441, *post*, and S. L. Act, 1890, s. 7, p. 354, *post*, would be necessary for the grant of a new lease in similar terms, ought to be given. It is also possible that, if a lease had been granted at too low a rent, it might lawfully be confirmed, if by depreciation in values the rent should subsequently come to be a fair rent.

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Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

As to surrenders generally, see Com. Dig. tit. *Surrender;* Co. Litt. 337; Prest. Shep. T. 303.

A surrender must be of the whole estate of the surrenderor, but not necessarily of the whole of the land.

At law there must be privity of estate between the surrenderor and surrenderee. Though this section enables an equitable tenant for life to *accept* surrenders of leases, it does not follow that he is the person to whom an actual surrender should or can be made, in cases where he is not at common law capable of taking such surrender. The question would not commonly arise in practice; because no actual surrender would commonly be made, the grant and acceptance of a new lease operating a surrender in law. It is conceived that the safer course is to

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make the actual surrender, if any, to the person having the immediate remainder or reversion upon the lease surrendered. But it is not improbable that the power to accept will be held to imply that an actual surrender may be made to an equitable tenant for life.

As to surrenders of contracts for leases, see s. 31, sub-s. (1), (iv.), p. 283, *post*.

On the surrender of a lease, the compensation may, according to circumstances, be payable either to or by the lessee. But the Act does not enable the tenant for life to apply capital moneys in payment of compensation to the lessee; although the value of the lessee's interest may be taken into account if a new lease is granted on the surrender. See sub-s. (5), *supra*.

It has been suggested, that when compensation is paid by the lessee in consideration of the acceptance of a surrender of the lease, it must be treated as capital money. In cases outside the Act, such compensation belongs to the tenant for life as a casual profit. (*Re Hunloke's S. E., Fitzroy* v. *Hunloke*, 1902, 1 Ch. 941.) The Act is silent upon this point. But it seems to be a fairer method to apportion the compensation money between the tenant for life and remainderman, in the same way as if it were consideration money received for the sale of leaseholds comprised in the settlement; as to which, see note on s. 34, p. 288, *post*. The extinguishment, by acceptance of a surrender, of a term which is onerous to the lessee, and therefore beneficial to the settlement, seems to have much the same practical effect, so far as the interests of persons taking under the settlement are concerned, as a sale of a beneficial leasehold comprised in the settlement.

The lessee paying such compensation money cannot safely pay it to the tenant for life. The same remark applies to compensation paid for dilapidations, in lieu of repairing. Such moneys seem to be capital money, and should be either paid into Court, or to the trustees, under s. 22, p. 263, *post*.

The last four sub-sections contemplate the making of a new lease, which is made in consideration (partly or wholly) of the surrender, and must take effect immediately upon the surrender. If the surrender and new lease are not both made parts of the same transaction, it does not appear that the interest of the lessee might be taken into account in arranging the terms of the new lease.

As to fines taken on the grant of a new lease, see note on s. 7, sub-s. (2), p. 232, *ante*.

Copyholds.

Sect. 14. Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof,

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as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

See the corresponding provision in the Settled Estates Act, 1877, s. 9.

Except by special custom, a copyholder cannot grant a lease of his copyhold for longer than a year without incurring forfeiture. If the copyholder should agree to lease for a year, *et sic de anno in annum*, reserving one day in every year, it is still a forfeiture. (*Lutterel* v. *Western*, 1 Bulst. 215.) But in *Worley* v. *Frampton*, 5 Ha. 560, the point was not raised, although the covenant in that case seems to have been equally objectionable.

It is conceived that this section gives no greater powers to the tenant for life than he would have if he were seised in fee simple of the manor, and that he cannot by virtue of it exceed the customs of the manor.

In manors where there exists a custom that the copyholder, on payment of a fine, can obtain a licence to lease as of right, such fines seem to be casual profits, and to belong to the tenant for life.

Of course, a tenant for life who is lord (for life) of a manor can exercise his right at common law to make fresh grants of copyholds; and if there is a special custom in the manor to make grants *de novo* of parcels of the waste to be held by copy of court roll, fines taken upon such grants will belong to the tenant for life, although they may be larger than the fines payable upon ordinary admittances. (*E. Cowley* v. *Wellesley*, 35 Beav. 635, at p. 640.) But the exercise of the right to grant new copyholds is restricted by the Copyhold Act, 1894, s. 81, reproducing the Copyhold Act, 1887, s. 6. Such new grants now require the previous consent of the Board of Agriculture, and must take effect as grants of the freehold.

V.—Sales, Leases, and other Dispositions.

Mansion and Park.

Sect. 15. *Restriction as to mansion house, park, &c.*

15. *Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the*

consent of the trustees of the settlement, or an order of the Court. S. L. A. 1882, Sect. 15.

This section was repealed by S. L. Act, 1890, and is replaced by s. 10 of that Act, p. 355, *post.*

Streets and Open Spaces.

Sect. 16. Dedication for streets, open spaces, &c.

16.—On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith ; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required ; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Compare the Settled Estates Act, 1877, s. 20.

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The phrase "open spaces" seems here to include certain "enclosed spaces," such as gardens, of which the use is confined to the neighbouring residents.

It is clear that the "general benefit" of the residents is the only, or at least the principal, object to be kept in view; and it is conceived that such benefit must be such as to bring in a sufficient pecuniary compensation to recoup to the settlement the loss of the land so dedicated; also, that any proposed scheme must be such as is usual with regard to similar undertakings. There is nothing to authorize a scheme designed for the benefit of the public generally; though there is no reason why the public should not incidentally obtain a benefit, provided that it be not such as to deteriorate the estate.

The costs of carrying out any improvement under this section may be paid for out of capital moneys under the Act. See s. 25, sub-s. (xvii.), p. 272, *post*. If no such money is available, the tenant for life may raise such moneys for the purpose by a sale of some other part of the settled land. If an application is made under the Settled Estates Act, 1877, s. 21, to have the money raised by mortgage, the scheme must be sanctioned by the Court under that Act. The present Act contains no power to raise money by mortgage for the purpose.

In urban districts it is usually advantageous to the estate to extend the use of necessary roads to the public, because such roads are usually adopted and subsequently maintained by the local authority.

By the 36 & 37 Vict. c. 50, a tenant for life, with the concurrence of the person next entitled for a beneficial interest in remainder in fee simple or fee tail, or his guardian, if an infant, may grant a site not exceeding one acre for the erection of a place of public worship; and may convey such site, whether he has the legal estate or not. A father who is tenant for life may concur as guardian on behalf of his infant son. (*Re Marq. of Salisbury*, 2 Ch. D. 29.)

When a garden or open space has been set apart under this section, the tenant for life may interfere to prevent abuse of it. Before the coming into operation of the Judicature Act, 1873, it was held by Hall, V.-C., that the owner in fee simple of a common garden, over which his tenants had rights of enjoyment, was entitled to an injunction to restrain a contractor, employed by the tenants to improve the garden, from committing a nuisance. (*Allen* v. *Martin*, L. R. 20 Eq. 462.) A tenant for life having the legal estate would clearly have the same right; and it is conceived that an equitable tenant for life, having no right at law, is even more clearly entitled to the aid of equity.

As to the powers of public bodies to acquire and manage open spaces, see the Open Spaces Act, 1906, 6 Edw. 7, c. 25. Sect. 20 of that Act defines an open space as meaning any land, whether enclosed or not, on which there are no buildings or of which not more than one twentieth part is covered with buildings, and the whole or the remainder of which is laid out

as a garden, or is used for purposes of recreation, or lies waste and unoccupied. This definition is taken, with a little extension, from the Metropolitan Open Spaces Act, 1881, 44 & 45 Vict. c. 34, s. 1, and affords an indication of what is meant by an "open space" in the S. L. Act.

S. L. A. 1882, Sect. 16.

Surface and Minerals apart.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

Sect. 17. Separate dealing with surface and minerals, with or without wayleaves, &c.

As to the grant and reservation of easements on exchange or partition, see S. L. Act, 1890, s. 5, p. 353, *post*.

A mining lease may include the grant of a wayleave for foreign minerals (*Re Aldam's S. E.*, 1902, 2 Ch. 46) and a right to let down the surface. (*Sitwell* v. *Earl Londesborough*, 1905, 1 Ch. 460.)

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

Under an ordinary power of sale and exchange, trustees could not sell or exchange the surface apart from the minerals. (*Buckley* v. *Howell*, 29 Beav. 546.) But by the T. A. 1893, s. 44 (p. 425, *post*), such a sale or exchange may be sanctioned by the Court. The section authorizes a tenant for life to grant a lease containing an exception of mines and minerals. (*Re Gladstone, G.* v. *G.*, 1900, 2 Ch. 101, overruling *Re Newell and Nevill's Contract*, 1900, 1 Ch. 90; *Re D. of Rutland's S. E.*, 1900, 2 Ch. 206.)

See further, as to "reservations" upon an exchange, s. 4, sub-s. (6), p. 226, *ante*.

Mortgage.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of

Sect. 18. Mortgage for equality money, &c.

S. L. A. 1882, Sect. 18.

the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

By S. L. Act, 1890, s. 11, p. 358, *post*, the tenant for life is empowered to raise money by mortgage for the discharge of incumbrances.

"Enfranchisement" in s. 18 includes the purchase of the freehold reversion expectant on the determination of a lease. (*Re Bruce, Halsey* v. *Bruce*, 1905, 2 Ch. 372.) "Required" does not mean absolutely necessary (1905, 2 Ch. 376).

Money raised by mortgage, being capital money, must be paid into Court, or to the trustees. See s. 22, sub-s. (1), p. 263, *post*. Notice of intention to exercise the power must be given as directed in s. 45, p. 305, *post*, as amended by S. L. Act, 1884, s. 5, p. 341, *post*, and S. L. Act, 1890, s. 7, p. 354, *post*.

By s. 46, sub-s. (6), p. 307, *post*, and s. 47, p. 309, *post*, the Court has power to direct money to be raised by mortgage for the payment of costs, charges, and expenses. See note on s. 46, sub-s. (6).

In cases where it is desired to raise money by the creation of a rent-charge for effecting improvements, recourse must be had to the Improvement of Land Act, 1864, 27 & 28 Vict. c. 114. By s. 30, p. 281, *post*, the improvements authorized by the present Act are incorporated into the Act of 1864. Money may also be so raised for drainage under the Public Money Drainage Acts, 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 13 & 14 Vict. c. 31; and 19 & 20 Vict. c. 9. As to water supply, see the Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877, 40 & 41 Vict. c. 31. And under the Settled Estates Act, 1877, ss. 20, 21, money may be raised by mortgage or charge, for constructing streets, gardens, sewers, water-courses, &c.

Undivided Share.

Sect. 19. Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

As a general rule, apart from this Act, persons possessed of undivided shares, though standing in a fiduciary position, may

S. L. A. 1882, Sect. 19.

concur with the owners of other undivided shares in exercising powers. In such cases the presumption is, that greater advantages to the trust estate will be obtained by concurrence. (*Re Cooper to Harlech*, 4 Ch. D. 802, at p. 817.)

The Act does not authorize the tenant for life to concur with the owners of *adjacent properties* in exercising powers. As regards selling, such concurrence is at the risk of the fiduciary owner, upon whom the onus lies of showing that a better price has been obtained by such concurrence. (*Re Cooper to Harlech*, at p. 816.) As regards leasing, such concurrence is improper. (*Tolson* v. *Sheard*, 5 Ch. D. 19; and see note on the Trustee Act, 1893, s. 13, at p. 398, *post*.)

But s. 27, p. 277, *post*, empowers the tenant for life to concur with adjacent owners, or other persons, in executing authorized improvements.

Sect. 2, sub-s. (10) (i.), p. 219, *ante*, provides that land shall include an undivided share of land. The present section is, therefore, not required for enabling the tenant for life to sell an undivided share comprised in the settlement, if he is willing to sell it separately. As to *Re Collinge's S. E.*, 36 Ch. D. 516, see note on s. 2, sub-s. (10) (i.); *Cooper* v. *Belsey*, 1899, 1 Ch. 639, p. 220, *ante*.

Conveyance.

Sect. 20.

Completion of sale, lease, &c. by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage or charge.

It is conceived that the phrase, "estate or interest the subject of the settlement," will not include, or enable to be conveyed, outstanding legal estates which are vested neither in the trustees of the settlement, nor by virtue of the settlement in any of the beneficiaries, except a reversion brought in by s. 2 (2), as in *Re Hunter and Hewlett*, 1907, 1 Ch. 46. Compare Conv. Act, 1881, s. 21, sub-s. (1), and note thereon, p. 91, *ante*.

As to whether, and how far, the tenant for life can exercise the powers conferred by the Act, when he has absolutely assigned his life interest, see note on s. 50, sub-s. (1), at p. 312, *post*.

On the question, whether a lease made at common law, not

S. L. A. 1882, Sect. 20.

under his statutory power of leasing, by the tenant for life, is valid against a lessee claiming under a subsequent lease made by him in exercise of his statutory power, see *ibid.*

When under the Lunacy Act, 1890, s. 124, the committee of a lunatic tenant for life is authorized to exercise statutory powers, this enables him not only to sell, but also to enter into fit and proper covenants on the lunatic's behalf. (*Re Ray*, 1896, 1 Ch. 468.)

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

See also S. L. Act, 1890, s. 4, p. 352, *post.*

The words "under this Act" must refer to the words "expressed or intended to operate," because so far as the purport of the deed exceeds the capacity or power of the tenant for life by the common law, it could not operate at all, except "under this Act." Therefore the deed must be either expressed or intended to operate under the Act; and it is conceived that the intention, if not expressed, must be collected from the contents of the deed itself, and not by reference to extraneous matter. Any other doctrine would open a door to fraud, especially in the case of mining leases where part of the rent is to be set aside as capital.

It has been held that the section does not render valid a lease which it was decided that the tenant for life had no power to grant under the Act, *e.g.*, a lease of the surface reserving the minerals. (*Re Newell and Nevill*, 1900, 1 Ch. 90.) But the decision has been overruled, and such leases may be granted under the Act. (*Re Gladstone, G.* v. *G.*, 1900, 2 Ch. 101; *Re D. of Rutland's S. E.*, 1900, 2 Ch. 206.)

A lease, such as might have been granted under the Act, granted by a person who believed himself to be absolute owner, and who purported to grant as such, but who in fact had the powers of a tenant for life, is valid; and a subsequent contract for the sale of the lease can be specifically enforced against the purchaser, though it appears that at the time when the lease was granted there were no trustees for the purposes of the S. L. Acts: the lessee having had no notice of such defect. (*Mogridge* v. *Clapp*; 1892, 3 Ch. 382.)

But when it is uncertain whether the lease did or did not comply with the provisions of the Act, the purchaser will not

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be compelled to take an assignment. (*Re Handman and Wilcox*, 1902, 1 Ch. 599.)

The conveyance of a tenant for life will now, at all events, discharge the land conveyed from jointure charges created by the same or any other tenant for life in consideration of marriage; see S. L. Act, 1890, s. 4, p. 352, *post*. (*Re Keck and Hart*, 1898, 1 Ch. 617; *Re Du Cane and Nettlefold*, 1898, 2 Ch. 96; *Re Hayes' S. E.*, 1907, 1 I. R. 88.)

And where the settlement consists of a series of deeds the tenant for life can convey free from jointure rent-charges created by any of them even prior in date to the deed by which his own life estate was limited. (*Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. 345, approved *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275; *Re Cornwallis West and Munro*, 1903, 1 Ch. 150; *Re Lord Wimborne and Browne*, 1904, 1 Ch. 537; *Re Phillimore*, 1904, 2 Ch. 460.) See note to s. 2 (1), p. 211, *ante*, on these cases, and also note to sub-s. (1), *infra*.

The case of *Grainge* v. *Wilberforce*, 5 Times L. R. 436, seems to decide the somewhat obvious proposition, that a person who is trustee of an equity only, is not a necessary party to a conveyance, where the concurrence of his *cestui que trust* either has been obtained or is unnecessary.

As the conveyance by the tenant for life discharges the limitations of the settlement, it follows that the purchaser takes the land freed from succession duty payable on deaths subsequent to the purchase. (See the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, s. 42, and *Re Warner's S. E.*, 17 Ch. D. 711, a case under the Settled Estates Act, 1877, but to which the same principle seems to apply.)

It would seem that, on a sale of settled land to the tenant for life, under S. L. Act, 1890, s. 12, p. 359, *post*, the trustees are the proper persons to execute the conveyance.

(i.) All estates, interests, and charges having priority to the settlement; and

These expressions will probably be held to include, and to protect, the rights of the lord of the manor with regard to copyholds comprised in a settlement; though such rights are more properly said to be "paramount to" the settlement than to "have priority to" it. This point is of importance chiefly in reference to the powers of leasing given by the Act.

Charges created under a general power of appointment are not, for this purpose, charges having priority over a settlement derived out of a fee simple arising under the barring of an estate tail created by a subsequent deed executed in exercise of the same power. (*Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. 345; approved in *Re Mundy and Roper*, 1899, 1 Ch. 275.)

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created

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for securing money actually raised at the date of the deed; and

This seems to refer to and include—

(1) Mortgages made by virtue of s. 18 or s. 47 of the present Act, or S. L. Act, 1890, s. 11.

(2) Mortgages made by trustees, or others, under any power to mortgage contained in the settlement.

Such powers, if designed to raise money for any purpose other than those specified in s. 18 and s. 47 of the present Act, or S. L. Act, 1890, s. 11, would not be powers "exerciseable for any purpose provided for in this Act," and therefore the consent of the tenant for life seems not to be necessary to their exercise by virtue of s. 56, sub-s. (2), p. 319, *post*. (See note thereon.)

(3) Charges made by virtue of any of the Acts referred to in the note on s. 18, p. 248, *ante*.

(4) Sums of money actually raised by way of portions under any power in that behalf contained in the settlement, and charges for securing the same. (See *Re Keck and Hart*, 1898, 1 Ch. 624.)

It does not include mortgages created by the tenant for life in respect of his life estate and an expectant remainder. (*Re Dickin and Kelsall*, 1908, 1 Ch. 213.) Consequently, if the persons holding such mortgages have consented to the sale, their concurrence in the conveyance is not necessary. (*S. C.*)

The effect of the sub-section is that mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life. (*Re Mundy and Roper's Contract*, 1899, 1 Ch. 275.)

Portions directed to be raised, but not actually raised at the date of the deed, and also rights of jointure, are defeated by the conveyance of the tenant for life. The claims so defeated will still remain valid as against all capital moneys arising by the exercise of the powers; which, therefore, cannot be applied under s. 21, *post*, in such a way as to prejudice such claims.

In an Irish case (*Connolly* v. *Keating*, 1903, 1 I. R. 353) it was held that "the deed" means the deed creating the charge, and that a conveyance by the tenant for life would pass the land discharged from an incumbrance created to secure a previously existing debt. In the absence of confirmation, it seems doubtful whether a purchaser could safely rely on this construction of the section.

Trustees of the settlement for purposes of the Act are not necessary parties, unless to any assurance, where their consent is necessary, by virtue of S. L. Act, 1890, s. 10, p. 355, *post*. But in cases where the purchase-money is not intended to be paid into Court, they should be made parties in order to obtain their receipt in the deed.

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement or under any statutory power, or being otherwise binding on the successors in title of the tenant for life. S. L. A. 1882, Sect. 20.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

If copyholds are devised to trustees in settlement, and the tenant for life sells under the Act before the trustees are admitted, the purchaser is only bound to pay one fine. (*Re Naylor and Spendla*, 34 Ch. D. 217.) In that case the lord was not entitled (having, it seems, omitted to make the customary proclamations) to seize *quousque* for want of a tenant; and the decision might not apply where the lord is entitled to seize at the time of the sale.

VI.—Investment or other Application of Capital Trust Money.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in Sect. 21. Capital money under Act; investment, &c., by trustees or Court.

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one, or partly in one and partly in another or others, of the following modes (namely):

See also the Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28, s. 20, Appendix II., *post*.

By the Finance Act, 1894, 57 & 58 Vict. c. 30, s. 9, sub-s. (7), money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the S. L. Act, may be expended in paying estate duty in respect of property comprised in the settlement and held upon the same trusts.

Money directed by a will to be laid out in the purchase of land to be settled in strict settlement, can be invested as capital money arising under the Act. (*Re Mackenzie*, 23 Ch. D. 750; see also *Re Tennant*, 40 Ch. D. 594.) These cases were approved by C. A. in *Re Mundy's S. E.*, 1891, 1 Ch. 399.

The words, "subject . . . to application thereof for any special authorized object for which the same was raised," seem to refer to s. 18, p. 247, *ante*, and S. L. Act, 1890, s. 11, p. 358, *post*, and to imply that money raised under those sections cannot be invested under this.

The Court has no jurisdiction to order capital moneys to be paid to persons residing abroad, even though all the beneficiaries are domiciled in a foreign country. (*Re Lloyd, Edwards* v. *Lloyd*, W. N. 1886, p. 37; 54 L. T. 643.)

In *Round* v. *Turner*, W. N. 1889, p. 38, 60 L. T. 379, Kay, J., refused to permit a charge to be created upon the purchase-money to be paid under a contract for the sale of agricultural land, for the purpose of working the farm pending completion.

Trustees in whom the legal estate in fee simple is vested, are "owners" within the meaning of the Public Health Act, 1848, which is in this respect identical with the Act of 1875; and they may apply capital moneys in payment of expenses incurred under the said Acts, notwithstanding a direction that the tenant for life shall keep the property in good repair. (*Re Barney, Harrison* v. *Barney*, 1894, 3 Ch. 562.)

A direction that accumulations of income of leaseholds shall become capital moneys of a settlement of realty, is not a direction to accumulate for the purchase of land only, and, therefore, is not within the Accumulations Act, 1892, s. 1. (*Re Danson, Bell* v. *Danson*, The Reports, Vol. XIII., p. 633.)

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any

railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities : S. L. A. 1882, Sect. 21.

A tenant for life directing the investment of capital money is in the same position as an ordinary trustee, and the Court will restrain him from directing an unsuitable investment to be made although it is within the words of the power. (*Re Hunt's S. E., Bulteel* v. *Lawdeshayne*, 1905, 2 Ch. 418; 1906, 2 Ch. 11.) And where trustees know that an investment is undesirable, they are justified in bringing the matter before the Court by summons.

For investments now permitted by law to trustees, see the Trustee Act, 1893, ss. 1—7, *post*.

(ii.) In discharge, purchase or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land :

Under S. L. Act, 1890, s. 11, p. 358, *post*, money may now be raised by mortgage for the discharge of incumbrances.

The power to redeem mortgages is restricted to such mortgages as affect the whole estate in the mortgaged land the subject of the settlement. But a mortgage over one part may be discharged out of moneys arising from another part, both parts being subject to the same limitations (*Re Chaytor's S. E. Act*, 25 Ch. D. 651 ; *Re Navan, &c. Rway. Co.*, 21 L. R. Ir. 369), even where the two parts are settled by different instruments. (*Re Lord Stafford's Settlement, Gerard* v. *Stafford*, 1904, 2 Ch. 72.) And the words "affecting . . . the whole estate," seem not to import of necessity that such whole estate is vested in the mortgagee; but only that it may be such as not by its nature to prejudice the rights of successive claimants under the limitations; and for this purpose a mortgage created by a long term is equivalent to a mortgage in fee. (*Re Frewen, F.* v. *James*, 38 Ch. D. 383.) If the remainders upon the life estate are diverse, they give rise to diverse settlements ; and moneys arising from lands comprised in one of such settlements cannot be applied in discharge of incumbrances affecting lands comprised in another. But in certain cases, where the limitations were not absolutely identical they have been held to

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create only one settlement, so far as the present purpose is concerned; see *Re Ld. Stamford's S. E.*, 43 Ch. D. 84; *Re Mundy's S. E.*, 1891, 1 Ch. 399; *Re Byng's S. E.*, 1892, 2 Ch. 219; *Re Freme, F.* v. *Logan*, 1894, 1 Ch. 1; cited in note to s. 2, sub-s. (1), p. 210, *ante*. And where land in Ireland and land in England are comprised in the same settlement, the capital moneys arising from the sale of land in Ireland, may be applied in payment of improvements to the land in England. (*Re Eyre Coote, Coote* v. *Cadogan*, W. N. 1899, p. 222.)

The word *incumbrance* in this sub-section did not include terminable charges, even though created for purposes coming within the scope of the present Act. (*Re Knatchbull's S. E.*, 29 Ch. D. 588.) But see now S. L. Act, 1887, s. 1, p. 349, *post*, and note thereon. It includes expenses incurred by a local authority in sewering, paving, and flagging new streets which have been charged on the land. (*Re Legh's S. E.*, 1902, 2 Ch. 274.) Incumbrance in s. 5 of the S. L. A., 1882, includes terminable rent-charges for the purposes of that section: see *ante*, p. 228.

A tenant for life may direct capital moneys to be applied in discharge of incumbrances, although his life estate is subject to a term created by the settlor for this purpose, provided the Court is satisfied that he is acting honestly in the interest of all parties. (*Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778.)

Capital moneys may under this sub-section be applied in redemption of a perpetual annuity charged upon impropriate tithes, which, subject to the annuity, are comprised in a settlement. (*Re Esdaile, E.* v. *E.*, W. N. 1886, p. 47; 54 L. T. 637.)

It has been decided by the C. A. that capital moneys arising by the sale of quasi-heirlooms, sold under s. 37, p. 294, *post*, may be applied under this sub-section, at the request of the tenant for life, in discharge of incumbrances (*Re Duke of Marlborough's Settmt., Marlborough* v. *Marjoribanks*, 32 Ch. D. 1), although the chattels are vested in an infant tenant in tail who may never become entitled to the land. (*Re Lord Stafford's Settlement, Gerard* v. *Stafford*, 1904, 2 Ch. 72.)

(iii.) In payment for any improvement authorized by this Act:

See s. 25, p. 268, *post*, and s. 22, sub-s. (2), p. 263, *post*, and notes thereon.

See also S. L. Act, 1887, s. 2, p. 350, *post*, S. L. Act, 1890, s. 15, p. 362, *post*, and *ibid.*, s. 13, p. 359, *post*.

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of

the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land : S. L. A. 1882, Sect. 21.

On the meaning of "seignory," see note on s. 3, sub-s. (ii.), p. 224, *ante*.

This sub-section authorizes the redemption of quit rents properly so called, being rent service reserved upon a grant in fee simple made before the statute *Quia Emptores*. It also confers by implication a power to enfranchise copyholds, when the copyhold interest is comprised in the settlement.

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life :

In some cases purchases made under this sub-section are likely to be more beneficial to the remainderman than to the tenant for life. Leaseholds, when comprised in strict settlements, are commonly settled by means of trusts, to go, as nearly as may be, according to the uses previously declared of freeholds; but by will the legal estate may be vested in a tenant for life with a quasi-remainder over; see note on Conv. Act, 1881, s. 65, p. 163, *ante*. In the former case the remainderman commonly is, and in the latter case he may be, a tenant in tail. In the event of his interest becoming an absolutely vested interest before the expiration of the term, such tenant in tail will be absolutely entitled to the whole residue. To merge this term in the reversion would therefore alter the rights of the parties. In the case of an infant or lunatic tenant in tail taking a vested interest, and in any other cases where the entail cannot be barred by the tenant in tail, the alteration would be practically important, but not where the tenant in tail can bar the entail as easily as he might dispose of the term. If the tenant in tail should die under age, the term would belong absolutely to his estate, while the estate tail in the reversion upon the term would descend to the heir (if any) in tail, or to the next remainderman, or the reversioner, upon the estate tail.

In cases where the trusts of settled leaseholds are such as will correspond with the uses of freeholds, also comprised in the settlement, "as nearly as the different tenure and rules of law will allow," it is a plausible suggestion, that the trust will best be complied with by not keeping the term on foot; because the difference which might occur in the modes of devolution seems to be due not to the intention of the parties but to rules of law which the parties were unable to contest and which they sought to control as far as their power went. But the question is not concerned

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solely with the intention of the parties at the date of the settlement, to the exclusion of the actual rights of the parties at the date of the purchase.

The Act gives no express authority to the trustees or the Court to adjust the rights of parties on the *purchase* of a reversion. As to *sales* of reversions, see s. 34, p. 288, *post*.

The money required for the purchase of a freehold reversion may also be raised on mortgage under s. 18, p. 247, *ante*. (*Re Bruce, Halsey* v. *Bruce*, 1905, 2 Ch. 372.)

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

"Land" in this sub-section does not include an equity of redemption. (*Re Radnor's S. E.*, W. N. 1898, p. 174.)

It is conceived that, on a purchase of leaseholds, the tenant for life is generally entitled to the whole income. The decision in *Re Bowyer's S. E.*, W. N. 1892, p. 48, seems to have depended upon the fact that the purchase-moneys were the proceeds of the sale of a reversion, not that the things purchased were leasehold. (See note on s. 34, p. 288, *post*.)

Where money is authorized by an Act of Parliament, such as the Lands Clauses Act, the Settled Estates Act, or a private Act, or by a settlement, to be laid out in the purchase of land, it has been held in a long series of cases that such money may be applied in the erection of new buildings (see *Re Barrington's Settmt.*, 1 J. & H. 142; *Re Newman's S. E.*, L. R. 9 Ch. 681; *Drake* v. *Trefusis*, L. R. 10 Ch. 364; *Re Speer's Trusts*, 3 Ch. D. 262; *Re Lytton's S. E.*, W. N. 1884, p. 193); but not in permanent improvements (*Drake* v. *Trefusis, supra*). In *Re Newman's S. E., supra*, Mellish, L.J., though consenting to follow the course of authority, doubted its propriety. The elaborate directions of the present Act, which include powers to erect certain kinds of buildings (s. 25, at p. 270, *post*), seem to make any such further extension inappropriate; and see *Re Ld. Gerard's S. E.*, 1893, 3 Ch. 252. The Settled Estates Act, 1877, and (as regards the building or improvement of a mansion house) the Limited Owners' Residences Act (1870), 33 & 34 Vict. c. 56, and the Limited Owners' Residences Act (1870) Amendment Act, 1871, 34 & 35 Vict. c. 84, will be available for such purposes. The two last-mentioned Acts are to be construed as one with the Improvement of Land Act, 1864, 27 & 28 Vict. c. 114. Sect. 3 of 34 & 35

Vict. c. 84, defines improvements of this nature, and is as follows:— S. L. A. 1882, Sect. 21.

34 & 35 Vict. c. 84, s. 3.

"The erection of a mansion house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion house and such appurtenances as aforesaid, and the improvement of and addition to any mansion house and such appurtenances as aforesaid already erected, and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature, provided that every such mansion house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate, shall be improvements within the meaning of the 'Improvement of Land Act, 1864,' and may, subject to the provisions of the recited Act, be charged upon such estate."

In 33 & 34 Vict. c. 56, s. 4, two years' rental of the estate is prescribed as the limit to what may be spent for these purposes. "*Estate*" is defined in s. 3 of 34 & 35 Vict. c. 84 as including all lands upon which any of such improvements is proposed to be made and any other lands in the neighbourhood of the same settled to the same uses. This definition and the whole of the Act of 1871 appear to have been overlooked in *Re Dunn's S. E.*, W. N. 1877, p. 39.

In *Frith* v. *Cameron*, L. R. 12 Eq. 169, trustees were, under the general jurisdiction of the Court, authorized to raise money by mortgage and employ it in rebuilding a mansion house upon a new site; the tenant in tail in remainder being an infant, the need for rebuilding being urgent, and proof being given that the result would be to increase the value of the whole property by at least as much as the cost. This jurisdiction should be restricted to what may be called "actual salvage" of an infant's property. (*Re Jackson, J.* v. *Talbot*, 21 Ch. D. 786; *Re Montagu, Derbishire* v. *Montagu*, 1897, 2 Ch. 8.) For a remarkable instance of salvage see *Neill* v. *N.*, 1904, 1 I. R. 513, where trustees were authorized to raise money by mortgage of a farm in Australia to pay for outgoings and the expenses of working and managing the farm.

By S. L. Act, 1890, s. 13, sub-s. (iv.), capital money not exceeding a half-year's rental may now be expended in rebuilding the principal mansion house; which seems to mean, half the total rental of the lands comprised in the settlement, not only of the particular estate upon which the mansion house stands. (*Ld. Gerard's S. E.*, 1893, 3 Ch. 252.)

The expense of erecting stables for the mansion house has been disallowed. (*Re E. of Lisburne's S. E.*, W. N. 1901, p. 91.)

On the conveyance by limited owners of sites for places of religious worship and burial places, see the Places of Worship Sites Act, 1873, 36 & 37 Vict. c. 50, and 45 & 46 Vict. c. 21.

In the case of capital money arising from land subject to a

S. L. A. 1882, Sect. 21.

trust for sale, &c., which is made settled land by s. 63, p. 333, *post*, restrictions are imposed upon its investment in land. See sub-s. (2), (ii.), of that section.

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

Quære whether this sub-section authorizes the exchange of the release of easements. (*Re Brotherton's Estate*, W. N. 1907, p. 230; 1908, p. 56.) But such a transaction may be carried out by means of cross sales of the easements. (*S. C.*)

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

Under s. 22 (5), *post*, p. 264, capital money is to be considered as land, and goes to the same persons as the land would have gone to if not disposed of. But this sub-section does not entitle the appointee of the land to a premium paid on the granting of a lease by a previous tenant for life. (*Re Moses, Beddington* v. *B.*, 1902, 1 Ch. 100; 1903, A. C. 13.) Nor does the sub-section convert into realty personalty directed to go upon the same trusts and in the same manner as if it had arisen from a sale of settled land under the Settled Land Acts. (*Re Walker, Macintosh-Walker* v. *Walker*, 1908, 2 Ch. 705.)

Purchase-money of land sold which is in Court under the Lands Clauses Act remains unconverted. A tenant in tail thereof is not entitled to such money without executing a disentailing deed. (*Re Reynolds*, 3 Ch. D. 61.) The same rule applies with regard to the present Act. (See s. 22, sub-s. (5), p. 264, *post*.)

Only absolute owners, as distinguished from limited owners and owners having defeasible interests, can elect upon questions of conversion. (*Sisson* v. *Giles*, 3 De G. J. & S. 614.)

Where there is no person beneficially entitled to purchase-money in the hands of trustees, it is *bona vacantia* and belongs to the Crown. (*Re Bond, Panes* v. *Attorney-General*, 1901, 1 Ch. 15.)

In the case of any woman married before the 1st January, 1883, and whose title accrued before that date, if the married woman, being absolutely entitled, should elect to take the money as personalty, it would, subject to any settlement or equity to a settlement, be payable to her husband. If the money should be in Court, her election must be testified by

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separate examination (*Standering* v. *Hall*, 11 Ch. D. 652; *Re Robins' Estate*, W. N. 1879, p. 95); unless the amount is under 200*l*. (*Wallace* v. *Greenwood*, 16 Ch. D. 362.)

The words "or empowered to give an absolute discharge," seem to incorporate the doctrine of *Re Hobson's Trusts*, 7 Ch. D. 708; namely, that money paid into Court under the Lands Clauses Act may be paid out to trustees of a settlement as being absolutely entitled; and to allow payment to the trustees, if they come within the definition of trustees for purposes of the Act. This power, however, is discretionary on the part of the Court. (See *Re Smith*, 40 Ch. D. 386.) If necessary, trustees will be appointed for the purposes of the Act, and the money will, at the request of the tenant for life, be ordered to be paid to them. (*Re Wright's Trusts*, 24 Ch. D. 662; *Re Harrop's Trusts*, *ibid.* 717; *Re Wootton's Estate*, W. N. 1890, p. 158.) Now by S. L. Act, 1890, s. 14, p. 361, *post*, the Court is expressly empowered to order capital moneys in Court to be paid out to the trustees; but it is conceived that, as regards capital moneys paid in by the direction of the tenant for life, they cannot be paid out without his consent, because otherwise his option under s. 22, sub-s. (1), p. 263, *post*, would be nugatory.

A payment into Court to the credit of a lunatic who is absolutely entitled, will not operate to effect a conversion, because the lunatic himself cannot elect. (*Re Barker*, 17 Ch. D. 241; *Re Freer*, *F.* v. *F.*, 22 Ch. D. 622.)

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act.

Costs may also, by direction of the Court, be paid out of money raised by mortgage. (See s. 47, p. 309, *post*. And as to the Court's discretion, see s. 46, sub-s. (6), p. 307, *post*.)

A tenant for life, an action against whom, undertaken for the purpose of restraining him from exercising his statutory powers, has been dismissed with costs, is entitled out of capital moneys to his extra costs of so much of the action as relates to his exercise of the powers. (*Re Llewellin*, *Ll.* v. *Williams*, 37 Ch. D. 317.)

Costs and expenses properly incurred by tenant for life in an attempted, but partially unsuccessful, sale, are payable out of capital moneys. (*Re Smith's S. E.*, 1891, 3 Ch. 65.)

If the tenant for life consists of more than one person, each is entitled to be represented by a separate solicitor in completing a sale made under the Act, and to have his separate costs out of the purchase-money. (*Smith* v. *Lancaster*, 1894. 3 Ch. 439.)

An intention to deal with certain portions of an estate will not enable a tenant for life to obtain, out of capital moneys.

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payment of the costs of making an elaborate survey of the whole estate. (*Re Eyton's S. E.*, W. N. 1888, p. 254.)

The charges of an estate agent in respect of commission for letting various portions of the estate on building leases, are payable out of capital money under sub-s. (10) (*Re Maryon Wilson's S. E.*, 1901, 1 Ch. 934), but not the commission for letting on a short occupation lease. (*Re Leveson-Gower's S. E.*, 1905, 2 Ch. 95.)

As to the form of order for payment of costs of sale, see *Re Rudd*, W. N. 1887, p. 251.

The costs of obtaining the consent of the tenant for life's mortgagee of his life estate, are not costs incidental to the exercise of his statutory powers, and in general ought not to be allowed out of the capital moneys produced by a sale. (*Cardigan* v. *Curzon-Howe*, No. 2, 41 Ch. D. 375.) See also as to costs of mortgagees of a life estate, *Sebright* v. *Thornton*, W. N. 1885, p. 176.

As to costs of applications under this Act, where the estate is being administered by the Court, see *Colyer* v. *Ferguson*, 82 L. T. Newsp. 138.

If trustees, instead of appearing as parties assisting the Court by checking the party making an application as to improvements under s. 25, simply concur in the application, they may fail to obtain their costs out of the estate. (See *Re Broadwater Estate*, 33 W. R. 738.)

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

The settlor may increase, but cannot diminish, these modes of applying capital.

The Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28, s. 20, provides that capital money may be applied for certain purposes of that Act. The section and the schedule therein referred to are printed App. II., *post*.

As to the exercise of concurrent powers, see s. 56, and note thereon, at p. 319, *post*. If the money has been raised by the exercise of a power conferred by the settlement, it may be laid out without the formalities prescribed by s. 26, p. 274, *post*; but not if it has been raised by the exercise of a statutory power.

In the present state of agricultura depression, it sometimes happens that settled land is in danger of going altogether out of cultivation, without expenditure which the tenant for life is unable or unwilling to make out of income. In such cases the Court has sometimes made orders in Chambers, allowing capital money to be applied for the purpose. Such an order was made 1st August, 1893, on a summons intituled *Re Hamond's Estate*, *Hamond* v. *Currey*, 1893, H. No. 2584.

S. L. A. 1882, Sect. 22.

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

For provisions relating to the payment of money into Court under this section, see the S. L. Act Rules, 1882, rr. 10—14, App. I., *post.*

Formerly, if the tenant for life had exercised his option by directing, or even only consenting to, payment into Court, the money must have remained there, and could not be paid out to the trustees on his petition. (*Cookes* v. *C.*, 34 Ch. D. 498.) But see now S. L. Act, 1890, s. 14, p. 361, *post.*

Here "trustees of the settlement" appears to mean trustees for purposes of the Act.

In *Hatten* v. *Russell*, 38 Ch. D. 334, Kay, J., seems to have held that, though there must be trustees at the time of the execution of the conveyance, this is not because the purchaser is in any way concerned about notices under s. 45, but because otherwise the tenant for life could not be said to exercise an option, and therefore there would be no means of obtaining a valid discharge for the purchase-money.

And it is now decided that s. 22 presupposes the existence of trustees; consequently, where no trustees exist, the purchaser cannot be required to pay the purchase-money into Court. (*Re Fisher and Grazebrook*, 1898, 2 Ch. 660.) But a purchaser paying his purchase-money into Court in ignorance of the fact that there are no trustees, will get a good title. (*S. C.*)

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

The direction of the tenant for life, if given in good faith, cannot be controlled by the trustees or the Court (*Re Ld. Coleridge's Settmt.*, 1895, 2 Ch. 704), unless it can be shown that the proposed investment is undesirable. (*Re Hunt's S. E.*, *Bulteel* v. *Lawdeshayne*, 1905, 2 Ch. 418; 1906, 2 Ch. 11.)

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Although the trustees are bound to obey the directions of the tenant for life, it seems that they must see that the money is applied in some way prescribed by the Act. Sects. 41 and 42, p. 302 and p. 303, *post*, do not excuse them from this duty. As to how far they must see to the carrying out of authorized improvements, see s. 26, p. 274, *post*. Where the tenant for life directs them to invest upon a specified mortgage they are not bound to do so until they are satisfied that the direction has been given on a proper investigation as to title, and upon a proper report as to the value of the proposed security, and upon proper advice as to the form of the mortgage; but on being so satisfied they are bound to make the investment. (*Re Hotham*, 1902, 2 Ch. 575, varying the order of the Court below, 1901, 2 Ch. 790.)

The tenant for life is not entitled to dictate to the trustees what broker they shall employ. The trustees may select their broker as well as their solicitor. (*Re D. of Cleveland's S. E.*, 1902, 2 Ch. 350.)

If under the settlement the trustees have power to effect repairs and improvements out of income, this will not of itself prevent the application of capital moneys in payment for authorized improvements, or interfere with the right of the tenant for life to direct such application. (*Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Lord Stamford's Estate*, 43 Ch. D. 84.) But where the mode of application is in the discretion or needs the consent of the Court, as, for example, when the money is in Court, or when the case comes under S. L. Act, 1890, s. 15, p. 362, *post*, the Court will not as a matter of course accede to the proposals of the tenant for life. (*Cardigan* v. *Curzon-Howe*, No. 3, 9 Times L. R. 244; *Re Partington, Reigh* v. *Kane*, 1902, 1 Ch. 711; *Re Keck*, 1904, 2 Ch. 22.)

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

See s. 46, sub-s. (3), p. 307, *post*.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

This seems to mean the tenant for life for the time being. If he should be an infant, it seems that the trustees may consent on his behalf, by virtue of s. 60, p. 330, *post*, although giving such consent is not, strictly speaking, exercising a power. See note on s. 2, sub-s. (5), p. 215, *ante*.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities

on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement. S. L. A. 1882, Sect. 22.

See note on s. 21, sub-s. (ix.), p. 260, *ante*.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

This enactment seems to be applicable only to the case of capital money arising by a sale of land. The income of capital money arising by other means will probably be held to go in the same way.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms IX., X., XI., App. II., *post*.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same. Sect. 23. Investment in land in England.

See note on s. 4, sub-s. (8), p. 228, *ante*.

It was held by Bacon, V.-C., in an unreported case (*Re Strousberg*) in February, 1886, that capital money might be expended upon the improvement of land in a foreign country settled by an English settlement, and this decision has since been followed by Neville, J. (*Re Gurney, Sullivan* v. *Gurney*, 1907, 2 Ch. 496; and see *Re E. Dunraven's S. E.*, 1907, 2 Ch. 417, where capital moneys were allowed to be expended on the improvement of settled estates in Ireland.)

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section. Sect. 24. Settlement of land purchased, taken

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in exchange, &c.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

The question has sometimes arisen, whether trusts created by reference to existing trusts create duplicate charges. In *Hindle* v. *Taylor*, 20 Beav. 109, Sir John Romilly decided in favour of the duplication; but his decision was reversed by Ld. Cranworth, L.C., 5 De G. M. & G. 577; which decision was approved in *Trew* v. *Perpet. Trustee Co.*, 1895, A. C. 264; see also *Baskett* v. *Lodge*, 23 Beav. 138. This is provided for by the last words of this sub-section. But it may now be considered settled that a charge, or a gift having the characteristics of a charge, will not be doubled by a subsequent gift of other property to be held upon the same trusts as the fund out of which the charge is payable, in the absence of a clear intention to the contrary.

"Freehold lands" properly includes all freeholds, whether of inheritance or not. The Act does not authorize the purchase of any freeholds other than a fee simple; but renewable leaseholds for lives are common in some parts of the country, especially in Ireland; and it might easily occur in practice that a settlement might authorize moneys produced by the exercise of a power of sale to be applied in the purchase of this kind of freeholds; in which case capital moneys arising under the Act might be invested in like manner by virtue of s. 21, sub-s. (xi.), p. 262, *ante*. Such leaseholds are properly estates *pur autre vie*. If settled by reference to the limitations in strict settlement of freeholds of inheritance, the whole estate does not vest absolutely in a quasi-tenant in tail so created, so as to destroy the succession under the quasi-entail; though he may convey the whole estate by any assurance *inter vivos*, without observing certain formalities required by a disentailing assurance. (See Challis, R. P. 2nd ed. 330, 331.)

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is

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by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

Copyholds are directed to be vested in the trustees upon trusts, &c., in order to avoid questions as to the possibility of actually conveying them to the uses, &c., declared of the freeholds. In the case of freeholds this difficulty does not arise.

Since the Statute of Uses does not extend to copyholds, successive legal estates in copyholds can only be raised by surrender to uses, not by merely declaring uses upon a conveyance. The trustees must for their own protection see that the conveyance is perfected by an actual surrender, which should be made to themselves.

"Leasehold land" seems in this section to mean "terms of years." In loose phraseology, under the name "leaseholds for lives," it is sometimes used to include estates *pur autre vie;* but these, as being beyond question freehold, are included in sub-s. (2), *supra.* If terms of years are settled by reference to the limitations in a strict settlement of freeholds of inheritance, or by reference to similar limitations by way of trusts, the whole term vests absolutely in the first tenant in tail of the lands whose estate becomes a vested interest. See note on Conv. Act, 1881, s. 65, sub-s. (5), at p. 165, *ante.* This result is prevented by the second clause of the present sub-section, but in regard only to tenants in tail by purchase, not by descent.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

With this and the two following sub-sections compare s. 5, p. 228, *ante.*

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an

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undivided share wherein, was before the exchange or partition subject to the charge.

The word "charge" is not restricted to charges having priority over the settlement. (*Re Ld. Stamford's S. E.*, 43 Ch. D. at p. 94.)

Land purchased with the proceeds of the sale of chattels settled to devolve with other lands, which last-mentioned lands are charged with jointures and portions, is not subject to such charges. (*Re D. of Marl. and Govrs. of Qu. Anne's Bounty*, 1897, 1 Ch. 712.)

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

By virtue of Conv. Act, 1881, s. 62, p. 158, *ante*, it will be possible to limit easements, &c., purchased for the benefit of the settlement, so that they may accompany strictly settled freeholds of inheritance.

VII.—Improvements.

Improvements with Capital Trust Money.

Sect. 25. Description of improvements authorized by Act.

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

As to the preliminaries and conditions subject to which improvements may be made, see next section.

As to the power of the tenant for life to concur with adjoining owners and others, see s. 27, p. 277, *post*.

As to the duties and liabilities of the tenant for life in regard to repairs, see ss. 28, 29, pp. 277, 280, *post*.

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Where a trustee had spent money in an improvement which the Court had no power to authorize, he was nevertheless allowed to be recouped out of a fund in Court in an administration action, it being admitted that the outlay was beneficial to the estate. (*Jesse* v. *Lloyd*, W. N. 1883, p. 88; 48 L. T. 656.) This case purported to follow, but in fact exceeded, the decision in *Vyse* v. *Foster*, L. R. 7 H. L. 318.

A tenant for life, who expends his own money in making improvements, whether authorized improvements or not, cannot, either by himself or by his representatives in title, make any claim for reimbursement against remaindermen; though under the S. L. Act, 1890, s. 15, p. 362, *post*, the Court may permit capital moneys to be applied in payment for improvements which have been so made, if they are of an authorized character. But the above rule does not apply to a person whose estate, he being at law absolute owner, is cut down to a life estate under the equitable doctrines relating to constructive trusts; and such a person is entitled to a charge upon the settled property for the amount by which its value has been increased by the improvements. (*Rowley* v. *Ginnever*, 1897, 2 Ch. 503.)

If there is no capital money, the Court has no jurisdiction under the Acts to charge the inheritance with the costs of authorized improvements. (*Standing* v. *Gray*, 1903, 1 I. R. 49.)

If capital money, derived from the sale of freeholds should be employed in paying for improvements effected upon leaseholds, the result may be very injurious to the interests of remaindermen. The fiduciary position of the tenant for life seems to make it improper for him to be a party to such expenditure, unless under very special circumstances. At the same time there seems to be no insuperable obstacle thereto, if the trustees are willing to approve of the scheme by virtue of s. 26, sub-s. (2), p. 275, *post*. But it is not clear that s. 42, p. 303, *post*, which speaks of *giving consents*, would afford them any protection if they should improperly give their *approval*.

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

This has been held to include improvements in the system of drainage to a mansion house. (See *Re Houghton Estate*, 30 Ch. D. 102; *Re Lord Leconfield's S. E.*, 1907, 2 Ch. 340.) But in *Re Tucker's S. E.*, 1895, 2 Ch. 468, the Court of Appeal refused to allow capital money to be applied in repaying expenditure incurred by the tenant for life upon such improvements. Such an expenditure may now be allowed under s. 13 of the Act of 1890, if it is reasonably necessary to enable the property to be let. (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 319.)

(ii.) Irrigation; warping:

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(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

See *Re Verney's S. E.*, 1898, 1 Ch. 508, 511, as to what may be included under this. It has been held to include the rebuilding of a garden wall in such a way as to bring more land into the garden. (*Re E. Dunraven's S. E.*, 1907, 2 Ch. 417.)

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

In an unreported case in Chambers, heard 7th July, 1887, before North, J., a bridge was permitted to be made under this section. Such expenditure is now authorized by S. L. Act, 1890, s. 13, sub-s. (i.), p. 359, *post*.

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, farm servants, and artizans, employed on the settled land or not:

The Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, s. 74, sub-s. (1), enacts as follows:—

"74.—(1.) The Settled Land Act, 1882, shall be amended as follows:—

* * * * *

"(b) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans whether employed on the settled land or not, include any dwellings available for the working classes, the building of which, in the opinion of the Court, is not injurious to the estate."

And now by S. L. Act, 1890, s. 18, p. 364, *post*, the expression "working classes" includes all classes of persons who earn their livelihood by wages or salaries.

The proviso that buildings are not to be injurious to the estate applies only where new buildings are to be erected. Alterations and additions to existing buildings may be within the Act, although the Court has never expressed an opinion

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that their building was not injurious to the estate. (*Re Calverley's S. E.*, 1904, 1 Ch. 150.) Dwellings of a kind suitable for the working classes, but occupied at the time by persons who are not members of those classes, are not suitable for the working classes within the meaning of the Act. (*Ibid.*)

A gardener's cottage is an improvement under this subsection. (*Re E. of Lisburne's S. E.*, W. N. 1901, p. 91.)

(xi.) Farmhouses, offices, and outbuildings, and other buildings for farm purposes :

This will not authorize expenditure in reconstruction of dry stone (unmortared) walls to divide fields. (*Re D. of Marlborough*, 8 Times L. R. 179.) But it includes re-roofing farm buildings with galvanized iron in place of thatch. (*Re Verney's S. E.*, 1898, 1 Ch. p. 512.) And see *Re E. of Lisburne's S. E.* (W. N. 1901, p. 91) for a case where the erection of farm buildings was allowed.

By s. 20 of the Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28, which repeals and re-enacts the Agricultural Holdings (England) Act, 1883, 46 & 47 Vict. c. 61, and the Agricultural Holdings Act, 1906, 6 Edw. 7, c. 56, capital money may be applied in payment of any money expended and costs incurred by a landlord under or in pursuance of the Act, or any enactment thereby repealed, or under custom, agreement, or otherwise, in or about the execution of any improvement comprised in Part I. or Part II. of the first schedule to the Act. It has been held that improvements of this nature could not be paid out of capital money when made by the tenant for life on his own initiative. (*Re Broadwater Estate*, 33 W. R. 738, a case upon the formation of silos.) But the Act of 1883 was not referred to, and s. 29 thereof did not contain the words "under custom or agreement or otherwise," which in effect insert in this section of the S. L. Act the improvements comprised in the first and second parts of this schedule.

For the schedule, see *post*, App. II.

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise :

The words "or otherwise" must be construed as meaning something *ejusdem generis*, and do not include an engine house for electric lighting (*Re Lord Leconfield's S. E.*, 1907, 2 Ch. 340), or mills for commercial purposes. (*Re Earl of Harrington's S. E.*, 75 L. J. Ch. 460.)

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs,

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sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

This includes a new water supply (*Re Kensington S. E.*, 21 Times L. R. 351), or an improvement in the water supply to a mansion house (see *Re Houghton Estate*, 30 Ch. D. 102; *Re Bulwer Lytton's Will*, 38 Ch. D. 20; *sed qu.* see *Re Tucker's S. E.*, 1895, 2 Ch. 468), comprising a complete equipment of a fire-extinguishing apparatus. (*Re E. Dunraven's S. E.*, 1907, 2 Ch. 417.) And it has been held by Kekewich, J., to authorize trustees to take shares in a waterworks company, for the purpose of developing a building estate. (*Re Orwell Park Estate*, W. N. 1894, p. 135.)

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing-places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market-places:

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

A cricket ground is an open space within this sub-section, but a pavilion is not a necessary or proper work in connection with it within the following sub-section. (*Re Orwell Park Estate*, 48 Sol. Journ. 193.)

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

By the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 31, the making of works for supplying sewage to lands for agricultural

purposes, is to be deemed an improvement of land authorized by the Improvement of Land Act, 1864, 27 & 28 Vict. c. 114. This does not seem to be included among the improvements authorized by the present section. S. L. A. 1882, Sect. 25.

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xx.) Reconstruction, enlargement, or improvement of any of those works.

The purposes enumerated by this section include, with considerable additions, all the improvements authorized by the Improvement of Land Act, 1864, s. 9; as to which see s. 30, p. 281, *post*.

The contrary opinion expressed by Kay, J., in *Re Newton's S. E.*, W. N. 1889, p. 201, was dissented from by Cotton, L.J., *S. C.* W. N. 1890, p. 24. And the fact that the commissioners under the Act of 1864 have sanctioned an improvement is treated by the Court as evidence that such improvement is within the S. L. A. 1882. (*Re Verney's S. E.*, 1898, 1 Ch. 508.)

Capital moneys may also be employed in any of the improvements mentioned in Sched. I., Parts 1 and 2, to the Agricultural Holdings Act, 1908; see Appendix II., *post*.

It has been held by North, J., under sub-sects. (xix.) and (xx.), that capital money may be applied in erecting new pumping engines for open mines. (*Re Mundy's S. E.*, 1891, 1 Ch. 399.)

The works referred to in sub-s. (xx.) mean any of the works previously mentioned in the section, however and whenever made, and not merely works already constructed under powers given by the Act. (*Re E. Dunraven's S. E.*, 1907, 2 Ch. 417.)

The following additional objects of expenditure, besides bridges, noticed *supra*, under sub-s. (viii.), are added by S. L. Act, 1890, s. 13, p. 359, *post*.

(a) Making additions to or alterations in buildings, reasonably required for enabling them to be let;

(b) Erection of buildings in substitution for buildings taken under compulsory powers; but the expenditure is restricted to the purchase-money for the buildings taken; and

(c) Rebuilding the principal mansion house; but expenditure not to exceed one-half of the annual rental.

Before the enactment of the S. L. Act, 1887, it had been held that this and the next following section were prospective only, and could not be used for the purpose of relieving a tenant for life from liabilities already incurred, by redeeming charges, which had, previously to the Act, been created under such Acts as the Improvement of Land Act, 1864. (*Re Knatchbull's S. E.*, 29 Ch. D. 588.) But now by the S. L. Act, 1887, s. 1, p. 349,

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post, such improvements, when of a kind authorized by the present Act, if executed before the Act, may be paid for out of capital money. See also S. L. Act, 1890, s. 15, p 362, *post*;

As to the building and improving of mansion houses, see note on s. 21, sub-s. (vii.), at p. 258, *ante*.

The unrepealed portions of 8 & 9 Vict. c. 56, enabling money raised for drainage works to be charged on land, seem to be rendered obsolete by the Improvement of Land Act, 1864.

As to raising money by the creation of a rentcharge for effecting improvements, see note on s. 18, at p. 248, *ante*.

As to the distinction between improvements and repairs, with regard to the application of capital money, see *Clark* v. *Thornton*, 35 Ch. D. 307, and *Re Partington, Reigh* v. *Kane*, 1902, 1 Ch. 711.

This section will not authorize the erection of an estate agent's house. (*Re Lord Gerard's S. E.*, 1893, 3 Ch. 252; overruling on this point *Re Houghton Estate*, 30 Ch. D. 102.) The attention of the Court was not called to S. L. Act, 1890, s. 18, p. 364, *post*; but *Re Lord Gerard's S. E.* has been followed by Kekewich, J., on this point. (*Re Lord Overstone's S. E.*, 123 L. T. Newsp. 322.)

Sect. 26.

Approval by Land Commissioners of scheme for improvement and payment thereon.

[*This marginal note is a survival from an inchoate stage of the Act. See note on s.* 28, *sub-s.* (1), *post.*]

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

The phrase, "trustees of the settlement," seems to be here used (as in a few other places) instead of the more strictly accurate phrase, "trustees for purposes of the Act."

Where an application is made to the Court under this section, the duties of the Court are not merely ministerial; it has a discretion, and must be satisfied that the scheme is a proper one. It is not enough to show that the trustees have approved the scheme, and the work has been done in pursuance of it. (*Re Keck's Settlement*, 1904, 2 Ch. 22.)

Where a scheme is submitted for approval to the trustees, the duty of the trustees is confined to seeing—(1) that the improvement is authorized by the Act, namely, that it is for the benefit of some land comprised in the settlement; (2) that the scheme is a proper one for carrying out the particular improvement; and (3) that in submitting the scheme the tenant for life is dealing *bonâ fide* and on competent skilled advice. The trustees are not concerned with the general policy pursued by the tenant for life in improving the property, nor, in a case

where there is capital money in hand, with the amount already spent on improvements. (*Re Earl of Egmont's S. E., Lefroy* v. *Earl of Egmont*, 1906, 2 Ch. 151.)

When the interest of the tenant for life is opposed to that of the remaindermen, the Court will not allow counsel for the trustees to argue in support of an application by the tenant for life. (*Re Hotchkin's S. E.*, 35 Ch. D. at p. 43.)

If the tenant for life had executed an improvement without first submitting a scheme and complying with the requirements of this section, he could not under this Act have obtained payment of the expenses out of capital moneys. (*Re Hotchkin's S. E.*, 35 Ch. D. 41.) But now see S. L. Act, 1890, s. 15, p. 362, *post*. Unforeseen and reasonable extensions of or additions to a properly-approved scheme might formerly have been paid for out of capital money. (*Re Bulwer Lytton's Will*, 38 Ch. D. 20), also an unimportant deviation from the scheme. (*Re Earl of Egmont's S. E.*, W. N., 1908, p. 176.)

The Court will not make a prospective order, authorizing trustees, who have no capital moneys in hand, to expend moneys coming into their hands upon improvements. (*Re Millard's S. E.*, 1893, 3 Ch. 116.) But trustees may approve a scheme for improvements submitted to them by the tenant for life before they have capital moneys in hand and available for the proposed expenditure, and when a scheme has been approved under these circumstances, and the improvements have been executed and paid for by the tenant for life. *bonâ fide*, with the knowledge of the trustees, for the purposes of and in accordance with the approved scheme, early expenditure being for the benefit of all parties interested, in anticipation of moneys becoming afterwards available for the purposes of the proposed scheme, the trustees are entitled, either with or without the approval of the Court, to reimburse the tenant for life the money so expended. (*Re Duke of Norfolk's Parliamentary Estates, D. of Norfolk* v. *Lord Herries*, 1900, 1 Ch. 461.) And the Court will decide the legal question whether proposed improvements are within the Act before there are moneys in hand to carry them out. (*Re Calverley's S. E.*, 1904, 1 Ch. 150.)

And where trustees have spent money on improvements the Court may in its discretion allow them, under s. 15 of the Act of 1890, to reimburse themselves out of capital moneys. (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 319, 324.)

Trustees acting on behalf of an infant in tail in possession under ss. 59 and 60, may prepare and approve their own schemes during the minority. (*Re Grey's Court Estate*, W. N. 1901, p. 60.)

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any

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work or operation comprised in the improvement, on—

If the tenant for life is dissatisfied with any refusal of the trustees to approve a scheme, he may apply to the Court under s. 44, p. 304, *post*. This seems to be implied by sub-s. (2) (ii.), *infra*.

As to the possible liability of trustees for "approving" an improvident scheme, see note on s. 25, at p. 269, *ante*.

(i.) A certificate of the *Land Commissioners* certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

Upon the constitution and functions of the Land Commissioners, now replaced by the Board of Agriculture, see s. 48, p. 309, *post*. Applications to them will be governed by the procedure under the Improvement of Land Act, 1864, 27 & 28 Vict. c. 114; *ibid*. sub-s. (6).

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the *Commissioners*, or by the Court, which certificate shall be conclusive as aforesaid; or on

The phrase, "able practical surveyor," occurs in the Lands Clauses Act, 1845, 8 Vict. c. 18, s. 59. The phrase, "practical surveyor," occurs in 34 Geo. 3, c. 75, s. 8; 52 Geo. 3, c. 161, s. 6.

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

An order may be made subject to a proper contract and specification being afterwards obtained and approved by the judge in chambers. (*Re Keck*, 1904, 2 Ch. 22.)

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or

certificate of the *Commissioners*, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement. S. L. A. 1882, Sect. 26.

For forms applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms XII.—XVI., App. I., *post*.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the costs thereof. Sect. 27. Concurrence in improvements.

As to concurrence with owners of undivided shares, which extends to "any purpose of the Act," see s. 19, p. 248, *ante*. The present section, which extends to concurrence with adjacent owners and other persons, as well as owners of undivided shares, is restricted in its scope to the execution of authorized improvements. As to concurrence with adjoining owners for other purposes, see note on sect. 19, *ante*.

The Act contains no express provision for apportionment of the expenses of joint improvements, but this seems to be necessarily implied in the provisions for concurrence in executing them.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the *Land Commissioners* by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the *Commissioners* by certificate in any case prescribe. Sect. 28. Obligation on tenant for life and successors to maintain, insure, &c.

See note on sect. 48, at p. 309, *post*.

In the absence of special provision in the settlement, the tenant for life, as between himself and the remainderman, is

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not bound to insure or to keep insured buildings originally comprised in the settlement, he being under no obligation to repair involuntary damage incurred by *vis major*. (Co. Litt. 53 b.)

As to liability for permissive waste, see the notes to *Greene* v. *Cole*, 2 Wms. Saund. 644; *Powys* v. *Blagrave*, 4 De G. M. & G. 448. Tenant for life, unless expressly made liable by the settlement, is not liable to the remainderman for permissive waste. (*Re Cartwright*, *Avis* v. *Newman*, 41 Ch. D. 532; *Re Parry and Hopkin*, 1900, 1 Ch. 160.) An equitable tenant for life of leaseholds is not bound to put leaseholds into any better state of repair than they were in at the testator's death. (*Re Courtier*, *Coles* v. *Courtier*, 34 Ch. D. 136.) And the costs of necessary repairs to real estate purchased under a power are chargeable to capital. (*Re Freman*, *Dimond* v. *Newburn*, 1898, 1 Ch. 28.) Unless it can be said that in *Re Fowler*, *F.* v. *Odell*, 16 Ch. D. 723, the terms of the will were such as expressly to impose upon the tenant for life the above-mentioned liability, that case has practically been overruled by *Re Courtier*, *supra*.

In *Re Baring*, *Jeune* v. *Baring*, 1893, 1 Ch. 61, Kekewich, J., supposing himself to be bound by *Re Courtier*, *supra*, reluctantly held that there was no obligation on the tenant for life to pay rent, repair, insure, or to pay fines or expenses of renewal. But in *Re Redding*, *Thompson* v. *Redding*, 1897, 1 Ch. 876, Stirling, J., pointed out that *Re Courtier* goes to no such length, and held that ground rents, current repairs, and other outgoings in respect of the leaseholds must be borne by the tenant for life. In *Re Tomlinson*, *Tomlinson* v. *Andrew*, 1898, 1 Ch. 232, where no trustees were appointed, Kekewich, J., adhered to the view of *Re Courtier* which he had expressed in *Re Baring*. But in *Re Betty*, *Betty* v. *A.-G.*, 1899, 1 Ch. 821, North, J., declined to adopt this view of *Re Courtier*; and in *Re Gjers*, *Cooper* v. *Gjers*, 1899, 2 Ch. 54, Kekewich, J., followed the decision in *Re Betty* in preference to that in *Re Tomlinson*, and this view has also been taken in the Irish Courts. (*Re Waldron and Boyne's Contract*, 1904, 1 I. R. 240.) It makes no difference to the liability of a tenant for life whether he receives the rack-rent of leaseholds or only a small improved ground rent. (*Re Copland's Settmt.*, *Johns* v. *Carden*, 1900, 1 Ch. 326.)

In an Irish case, *Kingham* v. *K.*, 1897, 1 I. R. 170, it was held that the tenant for life must pay ordinary tenants' repairs, head-rent, and taxes; but that the trustees must keep the property insured against fire. (See also *Re Fowler*, *F.* v. *Odell*, 16 Ch. D. 722; *Debney* v. *Eckett*, 43 W. R. 54.)

A contract of fire insurance is only a contract of indemnity. (*Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Rayner* v. *Preston*, 18 Ch. D. 1; *West of England Fire Insce. Co.* v. *Isaacs*, 1897, 1 Q. B. 226.) In *Warwicker* v. *Bretnall*, 23 Ch. D. 188, it was held, that an infant tenant in tail, out of whose income the premiums had been paid, was not bound to reinstate the buildings destroyed; and the opinion expressed in 3 Dav. Prec. 3rd ed. p. 290, *note*, that although the tenant for life may not be bound to insure, yet, if he insures, he is bound to lay out the insurance

money in rebuilding, was questioned by Chitty, J., as lacking authority. Kekewich, J., subsequently adopted this expression of opinion, and held that a tenant for life, who insured when under no obligation to do so, was entitled to the insurance money as against the trustees of the settlement. (*Gaussen* v. *Whatman*, 93 L. T. 101.) It is to be observed, however, that in neither *Gaussen* v. *Whatman* nor *Warwicker* v. *Bretnall* was there any intention of rebuilding; and in *Re Quicke's Trusts, Poltimore* v. *Quicke*, 1908, 1 Ch. 887, Swinfen Eady, J., held that, as under the Fires Prevention (Metropolis) Act, 1774, s. 83, the remaindermen were entitled to have the money recovered on the policy applied in rebuilding, the infant tenant for life was not entitled to a charge on the rebuilt premises. He, however, apparently followed *Gaussen* v. *Whatman* as to the moneys recovered in respect of an insurance of chattels to which the Act of 1774 did not apply.

Of course money received from insurances effected under the present section must be laid out in reinstating the damaged premises. (See *Re Quicke's Trusts, Poltimore* v. *Quicke*, 1908, 1 Ch. 887.)

See further, as to insurance in general, note on the Conv. Act, 1881, s. 23, sub-s. (3), p. 97, *ante*.

Under S. L. Act, 1887, s. 2, the improvements referred to in sect. 1 thereof are to be deemed to be improvements within the present section. (See p. 350, *post*.)

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

Planting is authorized by s. 25, sub.-s. (ix.), p. 270, *ante*.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the *Commissioners*, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the *Commissioners* the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The *Commissioners* may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

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(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Execution and Repair of Improvements.

Sect. 29.
Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

The emphatic words of this section seem to be, *without impeachment of waste*, &c., and the intention of the section seems to be restricted to effecting this object; that is to say, to enacting that nothing done under this section shall be construed as waste. It is not easy to suppose that the Act enables limited owners to enter upon, and improve, land in the occupation of lessees, or to enter for the purpose of executing improvements for the benefit only of adjoining land, when they would not be able so to do if they were absolute owners. But the apparently corresponding provisions in the Improvement of Land Act, 1864, 27 & 28 Vict. c. 114, ss. 32—34, authorize the person making

the improvements to take proceedings with the consent of the Inclosure Commissioners, now the Board of Agriculture, under the Drainage Acts, to obtain exceptional authority for invading the rights of third persons.

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Improvement of Land Act, 1864.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the *Land Commissioners* after the commencement of this Act, all improvements authorized by this Act.

Sect. 30. Extension of 27 & 28 Vict. c. 114, s. 9.

As to the replacement of the Land Commissioners by the Board of Agriculture, see note to s. 48, at p. 310, *post*.

The Improvement of Land Act, 1864, 27 & 28 Vict. c. 114, s. 9, is as follows :—

"**9.** By 'the improvement of land' shall herein be meant all or any of the following matters: 27 & 28 Vict. c. 114, s. 9.

1. The drainage of land, and the straitening [*sic*], widening, deepening, or otherwise improving the drains, streams and water-courses of any kind:
2. The irrigation and warping of land:
3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner:
4. The inclosing of lands, and the straitening [*sic*] of fences and re-division of fields:
5. The reclamation of land, including all operations necessary thereto:
6. The making of permanent farm roads and permanent tramways and railways and navigable canals for all purposes connected with the improvement of the estate:
7. The clearing of land:
8. The erection of labourers' cottages, farm-houses, and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farm-houses, and other buildings for farm purposes already erected, so as such improvements or additions be of a permanent nature:
9. Planting for shelter:
10. The constructing or erecting of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, water-courses, bridges, weirs, sluices, floodgates, or hatches, which will increase the value of any land for agricultural purposes:
11. The construction or improvement of jetties or landing places

S. L. A. 1882, Sect. 30.

on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes; provided that the *Commissioners* shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof:

12. The execution of all such works as in the judgment of the *Commissioners* may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof."

VIII.—Contracts.

Sect. 31. Power for tenant for life to enter into contracts.

31.—(1.) A tenant for life—

On carrying into effect contracts made by a predecessor, see as to contracts for leases, s. 12, p. 240, *ante*; and as to other contracts, S. L. Act, 1890, s. 6, p. 354, *post*.

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

This does not seem to authorize the insertion in a lease of an option to the lessee to purchase. Such options are *ultra vires* in the case of persons exercising powers in a fiduciary capacity; as to which see s. 53, p. 316, *post*. (*Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.) If it is desired that such a power should be exerciseable, it must be expressly given by the settlement, as is sometimes done. (See *Hallett to Martin*, 24 Ch. D. 624.) The section does not seem to authorize the insertion of a covenant for renewal. Compare *Re Farnell's S. E.*, 33 Ch. D. 599; *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63.

Now, by S. L. Act, 1889, s. 2, p. 351, *post*, an option to purchase, subject to the restrictions therein specified, may be inserted in building leases and agreements for building leases.

See S. L. Act, 1890, s. 6, p. 354, *post*, as to the execution of conveyances for giving effect to building contracts made by predecessors in title of the tenant for life.

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

S. L. A. 1882, Sect. 31.

For provisions as to leases, see sects. 6—12, and notes thereon, pp. 229—241, *ante*.

A contract by tenant for life to exercise a power of leasing vested in him by the settlement, is binding upon the remaindermen, independently of the present provision. (*Shannon* v. *Bradstreet*, 1 Scho. & Lef. 52.)

It is conceived that the restriction as to time imposed upon leases by s. 7, sub-s. (1), p. 231, *ante*, must be extended to contracts for leases. But this does not seem to apply to cases of accidental delay, prolonged beyond the period of twelve months, arising out of difficulties as to title, power to give possession, litigation, or otherwise.

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

As to the acceptance of surrenders by the tenant for life, see s. 13, p. 242, *ante*.

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any

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such successor, in the like case and manner, if any, as if it had been made by himself.

As to the time within which a contract may be enforced, see Fry on Specific Performance, Part III., ch. xxv., 3rd ed. pp. 489 *et seq.*

Since the contract "enures for" the benefit of the settled land, it seems that a forfeited deposit is capital money. Where a power of sale, with consent of the tenant for life, was vested in trustees, it has been held that a forfeited deposit did not go to the tenant for life. (*Shrewsbury* v. *S.*, 18 Jur. 397; cited, Dart, V. & P. ch. v. sect. iv. 7th ed. p. 217.)

It is conceived that if the successor in title is an infant, the trustees may complete, vary, or rescind, a contract on his behalf under sects. 59, 60, p. 329, *post.* This conclusion seems to be supported by the principles laid down in *Davis* v. *Harford*, 22 Ch. D. 128.

As to contracts by a tenant in tail, see notes on s. 58, sub-s. (1), (i.), p. 323, *post.*

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

The tenant for life, before commencing or defending an action, may apply for directions under this sub-section, for the purpose (*inter alia*) of procuring the payment of costs, if necessary, out of capital. In proper cases costs will, if necessary, be ordered to be raised by mortgage under s. 47, p. 309, *post.* For an order under sub-s. (3), declaring that a tenant for life could sell free from jointures, and giving directions as to the purchase-money, see *Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. p. 358.

The Court cannot adjudicate upon the claims of persons not parties to the contract, or successors by or against whom the same is enforceable. (*Re Ailesbury S. E.*, W. N. 1893, p. 140; 42 W. R. 45.)

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

Compare Conv. Act, 1882, s. 4, and see note thereon, at p. 190, *ante.* Where a lease is subsequently executed in accordance with a preliminary contract, the lease itself is the commencement of the lessee's title. (*Hughes* v. *Flannagan*, 30 L. R. Ir. 111.)

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XVII., App. I., *post.*

IX.—Miscellaneous Provisions.

S. L. A. 1882, Sect. 32.

Application of money in Court under Lands Clauses and other Acts.

8 & 9 Vict. c. 18.
23 & 24 Vict. c. 106.
32 & 33 Vict. c. 18.
40 & 41 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

As to when money is "liable to be laid out in the purchase of land," see the note to s. 33, *post*, p. 287.

Money paid into Court under the Lands Clauses Act may be paid out to the trustees at the request of the tenant for life. (*Re Duke of Rutland's Settmt.*, W. N. 1883, p. 140; 31 W. R. 947. See also *Re Wright's Trusts*, 24 Ch. D. 662; *Re Harrop's Trusts*, *ibid.* 717; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576; *Re Wootton's Estate*, W. N. 1890, p. 158; *Re Belfast Improvement Act, Ex pte. Reid*, 1898, 1 I. R. 1.) Such orders are not made as of course, but reason must be shown for supposing that the payment will be to the advantage of the settlement. An order made on petition cannot be varied on summons. (*Re Sanders*, 70 L. T. 755.)

In Ireland small sums paid into Court under the Labourers (Ireland) Acts have been paid out to the tenant for life, sometimes on, and sometimes without, an undertaking by him to employ the same in permanent improvements. (*Re Navan Rural District Council*, 1902, 1 I. R. 6; *Re Coleraine Rural District Council, Ex parte Lyle*, 1903, 1 I. R. 445; *Re Coleraine Rural District Council, Ex parte Giveen*, 1903, 1 I. R. 447.) Under this section a large sum of money, which had been paid into Court under a private Act, was ordered to be paid out to trustees appointed for purposes of the present Act, under s. 38, p. 299, *post*, and the judge expressed the opinion that notice should be given by them to the tenant in tail in remainder of all proposed investments or applications of such money; but that there was no jurisdiction to impose any such restriction as

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a condition of the payment out. (*Re Bolton Estates Act*, W. N. 1885, p. 90; 52 L. T. 728.) In this case the "tenant for life" appears to have been a tenant in tail who was restrained from barring the entail by statute; as to which see s. 58, sub-s. (1), (i.), p. 322, *post*.

A Railway Company, or other public body, taking lands compulsorily must pay any extraordinary additional expenses which happen to be caused by the circumstances of the case. (*Re Brooshooft's Settmt.*, 42 Ch. D. 250. See also *Re Olive's Estate*, 44 Ch. D. 316.) When money so paid in is invested in the erection of new buildings, the public body must pay the costs of the investment, so far as they are caused by the payment out—*e.g.*, the costs of obtaining the chief clerk's certificate certifying the amount of the surveyor's fees and the person to whom they are payable; but not the surveyor's fees themselves. (*Re Arden*, 70 L. T. 506. The headnote to this case seems to be incorrect.) Where an Act confers compulsory powers, but contains no provision for payment out, the Court has jurisdiction to order the public body to pay the costs. (*Re Fisher*, 1894, 1 Ch. 53, 450.)

The purchase-money of lands belonging to a charity and taken by a public body, having been paid into Court under the Lands Clauses Act, has been held to come within this section for purposes of investment. (*Re Byron's Charity*, 23 Ch. D. 171.) The same doctrine applies to the purchase-money of glebe lands belonging to a vicarage (*Ex pte. Vicar of Castle Bytham*, 1895, 1 Ch. 348), or municipal corporation. (*Ex pte. Corporation of City of London, Ex pte. Corporation of West Ham*, 17 Times L. R. 232.)

A public body having taken settled land and paid the purchase-money into Court, it was held that they must pay all the costs of an *interim* investment under the present Act, though the Act by virtue of which they took the land only provided for *interim* investment in Government securities. (*Re Hanbury's Trusts*, W. N. 1883, p. 116; 31 W. R. 784.)

As to whether money in Court, being the proceeds of the sale of realty in a partition action, under the Partition Act, 1868, and belonging to infants, is money liable to be re-invested in land by virtue of sects. 23—25 of the Settled Estates Act, 1856, re-enacted by the Settled Estates Act, 1877, ss. 34—36, which are incorporated with the Partition Act, 1868, see *Mordaunt* v. *Benwell*, 19 Ch. D. 302.

This section does not, of course, authorize for the purposes of ordinary settlements of personalty the investments authorized by the present Act, or make them proper trustees' investments for any purpose except the purposes of this Act. (See *Fox* v. *Dolby*, W. N. 1883, p. 29.)

As to the separate examination of married women under the Settled Estates Act, 1877, s. 50, see *Re Arabin's Trusts*, W. N. 1885, p. 90; 52 L. T. 728, where Kay, J., said it would be safer to take the examination. But it has been held by Kekewich, J., in *Re Ward's S. E.*, W. N. 1895, p. 41, that where a married

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woman, tenant for life under the present Act, is a party to a petition for payment out of money in Court to the trustees of the settlement, separate examination is not necessary, if the petition is intituled under the present Act. And in *Re Batt's S. E.*, 1897, 2 Ch. 65, where a woman married before 1883 was party to an application under the Settled Estates Act relating to property acquired by her since 1882, it was held that she need not be separately examined. See also note on the M. W. P. Act, 1882, s. 1, sub-s. (2), at p. 451, *post*, and cases there cited.

The Court, under special circumstances, may allow the costs of a petition for the payment out of Court and investment under this Act of money paid in under the Lands Clauses Act, notwithstanding R. S. C. Ord. LV. r. 2 (7). (*Re Bethlehem and Bridewell*, 30 Ch. D. 541.)

When a small portion of settled land, which was held by a lessee at a rent, was taken by a company under compulsory powers, and the lessee agreed to pay to the tenant for life the undiminished rent for the residue left in his hands, it was held that the tenant for life could not be allowed to make a profit on the transaction, and that the whole income of the company's purchase-money must be accumulated during the continuance of the lease. (*Re Griffith's Will*, 49 L. T. 161.) It would seem, if we may rely upon this decision, which purports to follow, but is in fact distinguishable from, *Re Wilkes' Estate*, 16 Ch. D. 597, that whenever a lessee voluntarily consents to have his rent raised, the tenant for life is not entitled to the benefit of the increase.

Sect. 33. Application of money in hands of trustees under powers of settlement. [*This marginal note is misleading.*]

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

It may be conjectured that this section was framed with a view to settlements comprising in their inception both land and money, for the purpose of putting money brought into the settlement upon the same footing as money arising under the settlement. But it was held in *Re Mackenzie's Trusts*, 23 Ch. D. 750, that the section applies to settlements of money only, provided that the money is directed to be laid out in the purchase of lands to be settled; and therefore that, no land having been purchased, the money might forthwith be invested in any way permitted by s. 21, sub-s. (i.), p. 254, *ante*. In *Re Mundy's S. E.*, 1891, 1 Ch. 399, it was decided that money directed by a will to be laid out in the purchase of lands, to be held upon the uses declared of other lands by an existing settlement, comes

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within this section, in the sense that it might be applied in effecting improvements on the lands comprised in the original settlement; and the decision in *Re Mackenzie's Trusts* was approved, apparently under the belief that the two cases are identical; whereas the latter case decided that, when a thing can be done circuitously, it may be done directly; and the former case decided that a settlement, and a settlement effected by reference to it, form together only one settlement for the present purpose.

It was held in *Re Tennant*, 40 Ch. D. 594, that money arising from a sale under the Settled Estates Act, 1877, invested under an Order of Court in the names of trustees, pending its application under s. 34 of that Act, might under the present section be invested in any mode authorized by s. 21 of the present Act. This decision also was approved in *Re Mundy's S. E., ubi supra.* (See also *Re Tesseyman's S. E.*, W. N. 1897, p. 168.)

It was held in an Irish case that a fund, which by the settlement is liable to be invested in land, to be settled in strict settlement, but which has been brought into Court in an administration action, is not within this section. (*Burke* v. *Gore*, 13 L. R. Ir. 367.) But in *Re Maberly, M.* v. *M.*, 33 Ch. D. 455, V.-C. Bacon held that trustees might defer such investment in land, and meanwhile invest the money under this section.

Moneys contributed under a direction in the settlement by tenant for life to form a sinking fund, come within the provisions of this section. (*Re Sudbury, &c., Vernon* v. *V.*, 1893, 3 Ch. 74.) So also moneys which trustees are empowered to lay out in the purchase of land, at the request of the tenant for life, are moneys "liable to be laid out in the purchase of land" within the meaning of the section. (*Re Hill, H.* v. *Pilcher*, 1896, 1 Ch. 962; *Re Soltau's Trusts*, 1898, 2 Ch. 629.) And it makes no difference if they are not empowered to lay out the money in the purchase of land generally, but only of a specified parcel. (*Re Hill, ubi supra.*) A power to invest in freehold ground rents brings money within the section. (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 319, 323.)

The tenant for life can direct how such moneys shall be applied (*Re Gee, Pearson-Gee* v. *Pearson*, W. N. 1895, p. 90); and if there is no tenant for life to exercise the option under this section, the Court may direct the purchase-money of land sold under the S. E. Act, 1877, to be applied as capital money under the Act of 1882. (*Re Tesseyman's S. E.*, W. N. 1897, p. 168.)

Sect. 34. Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in

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the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

The object of this section is to prevent a sale made under the Act of a limited interest, or an interest not in possession, from operating to the prejudice of any party interested under the settlement, whether tenant for life or remainderman. The words which direct apportionment follow, with some verbal improvements, the corresponding words of the Settled Estates Act, 1877, s. 37, which are identical with the corresponding words of the Lands Clauses Consolidation Act, 1845, s. 74. It is conceived that cases under those sections will form precedents for the interpretation of this. (This conclusion seems to have been adopted in *Cottrell* v. *C.*, 28 Ch. D. 628.) The Partition Act, 1868, 31 & 32 Vict. c. 40, does not contain any similar provision. As to the effect of this omission, see *Langmead* v. *Cockerton*, W. N. 1877, p. 43.

Under the former Acts, the discretion as to apportionment was exerciseable only by the Court.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XVIII., App. I., *post*.

I. As to Leaseholds.

Where leaseholds were taken under the compulsory powers conferred by the Lands Clauses Act, it was held that, although the income of the investments representing the purchase-money exceeded the rents of the leaseholds, the tenant for life was entitled to an annuity which would exhaust the whole fund in the same number of years as the leaseholds had to run. (*Askew* v. *Woodhead*, 14 Ch. D. 27, which was followed in *Re Hunt's Estate*, W. N. 1884, p. 181.) Where leaseholds were sold under the Settled Estates Act, and the tenant for life suffered by reason of the sale a diminution of income, the Court directed a calculation to be obtained from an actuary of the half-yearly sums which would be produced for the residue of the term by the proceeds of sale, taking interest at £3 per cent., so as to exhaust the proceeds of sale at the end of the term; and ordered that in each half-year the dividends on the investments then remaining should be paid to the tenant for life, and so much of the investments should be transferred to him as, with the cash dividend, would make up the half-yearly sum so to

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be ascertained: the residue of the fund, if any, at the expiration of the life interest to go to the persons absolutely entitled in remainder. (*Re Walsh's Estate*, 7 L. R. Ir. 554.)

Where leaseholds are renewable, and the settlor intended them to be perpetually renewed, the effect of a compulsory sale is only to substitute one perpetuity for another; and the purchase-money will be invested as capital, and only the annual income paid to the tenant for life. (*Re Wood's Estate*, L. R. 10 Eq. 572; *Hollier* v. *Burne*, L. R. 16 Eq. 163; *Maddy* v. *Hale*, 3 Ch. D. 327.)

And the same rule holds good when the leaseholds are not in fact renewable, but the settlor expected that they would be renewed and contemplated their perpetual renewal; though, in fact, renewal is refused. (*Re Barber's S. E.*, 18 Ch. D. 624. See, also, *Re Ld. Ranelagh's Will*, 26 Ch. D. 590.)

As to the destination of a fund intended for the renewal of leaseholds, of which renewal was in fact refused, see *Gould* v. *Tripp*, W. N. 1883, p. 72.

II. As to Reversions.

Where the rent was only nominal, the whole purchase-money was directed to be invested and accumulated during the term. (*Ex pte. Rector of Lambeth*, 4 Railw. Ca. 231.)

Where the rent, not being nominal, was less than the dividends on the invested purchase-money, the tenant for life received an amount equal to the rent, and the surplus was accumulated. Also, at the time when any lease would have determined, the tenant for life became thenceforth entitled to a proportionate share of the income accruing upon the accumulations. (*Re Wilkes' Estate*, 16 Ch. D. 597; which see, for form of order, at p. 602. See, also, *Cottrell* v. *C.*, 28 Ch. D. 628.) On similar principles it was held, in *Re Bowyer's S. E.*, W. N. 1892, p. 48, where the proceeds of the sale of the reversion on leases having thirty-five years to run, were invested in the purchase of leaseholds having a much longer term, the rents on which exceeded the old rents, that the tenant for life was entitled during the thirty-five years only to the amount of the old rents.

It might be held that, if the rent should be less than the dividends, the tenant for life, with whose consent the investment was made, would in general be entitled to no more than the dividends. But cases might arise in which this principle might reasonably be modified. For example, if the property should be let at a rent greater than a rack-rent (which sometimes happens by the depreciation of a neighbourhood), so that an element in the valuation would be the lessee's liability to pay an excessive rent during the residue of a term, it would be reasonable, and in accordance with the apparent intent of this section, that the tenant for life should be allowed some advantage to compensate his loss from the conversion. This might

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be effected by investing the amount due to that particular element in the valuation in the purchase of an annuity to continue during as many years as the term had to run, and permitting the tenant for life, so long as he lived, to receive the annuity. Or a proportionate allowance might be made out of the capital to the tenant for life, such as would, in the same number of years as the term had to run, exhaust the amount due to the particular element above mentioned.

A legal estate for life may by will, but not by deed, be created out of a term of years. See note on the Conv. Act, 1881, s. 65, sub-s. (2), at p. 163, *ante*. Such a bequest would be specific, and would, therefore, imply no duty to convert. (*Vaughan* v. *Buck*, 1 Ph. 75; *Hubbard* v. *Young*, 10 Beav. 203; *Mills* v. *Brown*, 21 Beav. 1.)

As to the service of notices in applications to the Court under this section, see the S. L. Act Rules, 1882, r. 4, App. I., *post*.

Sect. 35. Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Timber planted as an improvement under the provisions of this Act may not be cut down except in proper thinning; see s. 28, sub-s. (2), p. 279, *ante*.

If land is sold with timber which the tenant for life had under the settlement power to cut, but which he did not in fact cut, he will not be allowed its value out of the purchase-money. (*Re Llewellin, Ll.* v. *Williams*, 37 Ch. D. 317.)

At common law a tenant for life is entitled to cut timber for his own use and benefit only so far as may be necessary to furnish reasonable house-bote, plough-bote, and hay-bote. (Co. Litt. 41 b.) If expressly made not impeachable for waste, he may cut ripe timber; which, if cut during the continuance of his tenancy, belongs to him. (*Lewis Bowles's Case*, 11 Rep. 79; see the 7th resolution at p. 82 b.) But he would be restrained in equity from cutting timber planted or left standing for shelter or ornament. (*Rolt and Ld. Somerville*, 2 Eq. Ca. Ab. 759; and see Seton, 5th ed. 477, 478; 6th ed. 550, 551, and the cases there cited.) It seems that such ornamental timber might be properly thinned. (*Baker* v. *Sebright*, 13 Ch. D. 179, at p. 188.)

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The question whether the timber is deemed to come within the description of ornamental, depends solely upon the intention of the settlor. (*Coffin* v. *C.*, Jac. 70.) With this decision it is difficult to reconcile the unreported case there cited by Lord Eldon from Lord Hardwicke, in which a tenant for life was restrained from cutting down trees which he himself had planted. As to what will amount to evidence that timber is ornamental, see *Weld-Blundell* v. *Wolseley*, 89 L. T. 59.

Since a tenant for life, whether he is or is not otherwise unimpeachable for legal waste, is so impeachable in respect to ornamental timber, the language of this section seems to include ornamental timber, and to permit the tenant for life, whether impeachable for waste or not, to cut it, upon obtaining such consent or order as in the section mentioned.

Before this Act, the Court would not permit timber to be cut on the application of a tenant for life having no power of cutting, unless the timber either was itself actually deteriorating, or was injuring other trees. Mere ripeness was not sufficient. (*Seagram* v. *Knight*, L. R. 2 Ch. 628; and the cases there cited at p. 631.) And when timber, whether ornamental or not, which the tenant for life could not himself cut, was properly cut with the leave of the Court, the proceeds were invested, and the income given to the successive owners of the estate, until the vesting in possession of the first estate of inheritance, the owner of which became thereupon entitled to the capital. (*Honywood* v. *H.*, L. R. 18 Eq. 306, at p. 311.) In that case Jessel, M.R., distinguished "timber estates," where timber forms the staple produce, from other cases: expressing the opinion that in such cases any cuttings in accordance with the established practice on the estate were lawful, and that the proceeds belonged to the tenant for life, even though impeachable for waste. For further observations upon this view, see *Dashwood* v. *Magniac*, 1891, 3 Ch. 306. It is there stated, that the expression "timber estate" is first to be found in *Ferrand* v. *Wilson*, 4 Ha. 344.

As to the cutting of timber under the present section, the trustees seem, in the absence of fraud, to incur no liability for giving their consent; see s. 42, p. 303, *post*. And their consent seems to be conclusive.

If the interference of the Court is sought either in default of trustees or on the refusal of the trustees to consent, it is conceived that, under ordinary circumstances, if the timber is not decaying, the Court will let it stand; and that, even when it is decaying, the Court will not order it to be cut down if the remainderman should object. The latter's right to keep it standing seems superior to the right of the tenant for life to have it cut.

This power of cutting timber is not one requiring notice of its exercise to be given to the trustees under s. 45, p. 305, *post*, and S. L. Act, 1884, s. 5, p. 341, *post*. The rules do not provide that any application by the tenant for life shall be served upon the trustees; and therefore, if at the time of the application

there are no trustees for purposes of the Act, it is not necessary to appoint such. S. L. A. 1882, Sect. 35.

Cut timber immediately becomes personal assets, even if cut by an order of the Court in Lunacy, *Oxenden* v. *Ld. Compton*, 2 Ves. 69; or by a bailiff acting without authority, *ibid.* at p. 74: there being no equity in favour of the heir as against the personal representatives. As to whether an express provision preserving the rights of the respective parties might be inserted in an order directing timber to be felled, see *Jones* v. *Green*, L. R. 5 Eq. 555, at p. 560, and *Re Barker*, 17 Ch. D. 241, at p. 245, both cited in *Re Freer, F.* v. *F.*, 22 Ch. D. 622, at p. 627. It seems to be the better opinion, that such a provision would have no effect.

As to the apportionment of the proceeds of windfalls, see *Swinburne* v. *Ainslie*, 30 Ch. D. 485; *Harrison* v. *H.*, 28 Ch. D. 220.

As to the power to cut timber for executing authorized improvements, see s. 29, p. 280, *ante*.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms VI., VII., App. I., *post*.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement. Sect. 36. Proceedings for protection or recovery of land settled or claimed as settled.

If an application is made by the committee of a lunatic tenant for life, for leave to oppose a Bill in Parliament affecting the settled estates, the Court in Lunacy, being composed of judges who have been requested by the Lord Chancellor to act as additional judges of the Ch. D., can make an order under this section. (*Re Blake*, W. N. 1895, p. 51.)

Compare the Settled Estates Act, 1877, s. 17, now repealed by s. 64, p. 338, *post*.

The costs, &c., here mentioned may be raised by mortgage under s. 47, p. 309, *post*.

Independently of this section, the Court under its general jurisdiction could allow the costs of proceedings in Parliament to be paid out of capital moneys (*Re Ormrod's S. E.*, 1892, 2 Ch. 318), or of an action to establish rights. (*Hamilton* v. *Tighe*, 1898, 1 I. R. 123.)

It has been doubted whether, under the Settled Estates Act, 1877, costs could be paid out of capital to the tenant for life

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unless he had applied to the Court before commencing the proceedings. (*Re E. De la Warr's Estates*, 16 Ch. D. 587. See, however, *Re Twyford Abbey S. E.*, 30 W. R. 268; *S. C. nom. Re Willan's S. E.*, 45 L. T. 745.) The words of the present section, "taken or proposed to be taken," seem to remove this difficulty.

It is conceived that the intention of this section is to enable the costs of proceedings, taken for the purpose of recovering something which is alleged to be part of the corpus of the trust estate, to be paid out of corpus. The proceedings must be for the benefit of the estate generally, and not for the benefit of the tenant for life only. In *Re E. of Aylesford's S. E.*, 32 Ch. D. 162, it was in effect decided by Bacon, V.-C., that if several persons claim to succeed as tenant for life to the estate, the successful claimant is entitled, under this section, to have his costs paid out of corpus. It is conceived that this decision cannot be supported. In that case, certain estates were limited in such a way that they would, as a matter of fact, devolve successively upon the persons successively succeeding to the Earldom of Aylesford; but the limitations, though in fact coincident, appear to have been quite distinct, and not made by reference. Therefore (apart from its intrinsic absurdity), there could be no foundation for the contention that the earldom was land subject to the settlement. Even if it had been, this section seems to contain nothing to relieve a successful claimant of the earldom from the obligation to pay his own costs before the Committee of Privileges, or to relieve a claimant of the estates from the obligation to pay the costs of establishing his own title as tenant for life. Much confusion seems to have been imported into that case by the citation of *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136; as to which see note on s. 37, at p. 297, *post*. In that case it was held that a baronetcy, though not titular of a place, might be "land," in such a sense as to enable chattels, settled to devolve with it, to be brought within the meaning of s. 37. But that case, assuming it to have been correctly decided, is hardly an authority for the proposition that a tenant for life is entitled to have the costs of establishing or defending his title paid out of corpus.

As to the costs of an application to Parliament before the Act, see *Stanford* v. *Roberts* (No. 2), 52 L. J. Ch. 50.

Sect. 37. Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be

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capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

As to the persons who will come within the definition of trustees for the purposes of this section, see note on s. 2, sub-s. (8), p. 218, *ante*.

Heirlooms properly so called are not personal chattels, but particular chattels which, by the customs of particular places, attend the inheritance. Heirlooms proper are not devisable. (Co. Litt. 18 b; *ibid.* 185 b; 2 Bl. Com. 427.)

Intermediate between heirlooms proper and the chattels which are the subject of the present section, are certain chattels, such as ensigns of honour, which are in the nature of heirlooms, but differ therefrom in that their descent to the heir is not due to particular local custom. (*Frances* v. *Ley*, Cro. Jac. 366; *E. of Northumberland's Case*, Owen, 124.)

Neither of the above-mentioned classes of chattels is within the present section, which refers to mere personal chattels, having no peculiar status in the eye of the law, arbitrarily settled upon trust to devolve with lands. They may conveniently be referred to as heirlooms, if the distinctions above noted are borne in mind.

Personal chattels are sometimes settled, not so as to devolve with land, but directly upon trusts limited by analogy to the uses of a strict settlement, so far as the law permits. (See *Shelley* v. *S.*, L. R. 6 Eq. 540.) It has been doubted (but, according to V.-C. Wood, in *Shelley* v. *S.*, *supra*, at p. 546, the doubt has not been approved) whether things in gross (which differ *numero tantum*, *non specie*) such as money, not having, like family jewels, an individual value and interest, can be settled directly upon such trusts, apart from and without reference to a settlement of lands, or unless there is a trust to purchase lands. (See *Green* v. *Ekins*, 2 Atk. 473, at p. 476.) It is plain that this section refers only to chattels devolving with land. It may be noted that a gift of a leasehold house and chattels to a nobleman "and to his successors, and to be enjoyed with and to go with the title," will not suffice to create an executory trust, but the legatee will take absolutely. (*Re Johnston, Cockerell* v. *E. of Essex*, 26 Ch. D. 538.)

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It will be observed that s. 37 does not confer upon a tenant for life any right to demise the personal chattels therein referred to, so that a tenant for life cannot grant a lease of a settled house and chattels together as a furnished house.

The land mentioned in the section means the land with which the chattels are to devolve, though settled by a different instrument. Consequently heirlooms bequeathed by will to be enjoyed by the person entitled under a settlement of land may be sold to discharge a mortgage on that land. (*Re Lord Stafford's Settmt., Gerard* v. *Stafford*, 1904, 2 Ch. 72.)

On the vesting of chattels, which are subject to the same limitations as realty in strict settlement, see note on Conv. Act, 1881, s. 65, sub-s. (5), p. 163, *ante*.

On the duties of the tenant for life, and the principles upon which the Court acts, under this section, see *Re Beaumont*, 58 L. T. 916; *Re E. of Radnor's Will Trusts*, 45 Ch. D. 402. The Court may be less ready to consent to a sale of heirlooms than to a sale of a mansion house. (*Bruce* v. *Marq. of Ailesbury*, 1892, A. C. 356.) There is no jurisdiction to sanction *ex post facto* a sale of heirlooms; but in *Re Ames, A.* v. *A.*, 1893, 2 Ch. 479, where an advantageous sale had been made, North, J., directed the trustees to take no steps to recover them. The Court will not consent to a sale merely for the purpose of relieving the tenant for life from consequences due to his own improvident conduct (*Re Hope's Settmt.*, 9 Times L. R. 506; 1899, 2 Ch. 691, n.: *Re Hope, De Cetto* v. *Hope*, 1899, 2 Ch. 679); or for the purpose of enabling him to pay succession duties and live in the mansion house. (*Re Featherstonhaugh's Settmt.*, 42 Sol. Jo. 198.) But where the tenant for life was in an impecunious position through no fault of his own, a sale was sanctioned to enable him to keep up his position and provide for himself and his wife if he married. (*Re Townshend's Settmt.*, 89 L. T. 691.)

The Court has assumed jurisdiction to order a separate sale of chattels so settled by will, during the minority of an infant tenant in tail of the lands, in order to pay off mortgages affecting the lands as part of the testator's estate, when satisfied that it would be for the benefit of all parties. (*Fane* v. *F.*, 2 Ch. D. 711.) But such a sale cannot (apart from the present section) be ordered merely upon the ground of benefit to the parties, when there are no charges upon the testator's estate. (*D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.) In the last-cited case, Jessel, M.R., held that the Court could do nothing beyond sanctioning an application to Parliament. The object of the present enactment is to save the expense of such applications; and the Court will probably hesitate to give leave for a sale except for the purpose of clearing off incumbrances, or in other cases where it would, previously to the Act, have sanctioned an application to Parliament.

A tenant for life applying to the Court for leave to sell heirlooms with a view to obtaining an increased income must show that the proposed sale is in the interest of all parties entitled

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under the settlement. If the application is for leave to sell an heirloom of unique character and historical repute, such as a famous jewel or work of art, the Court in the exercise of the judicial discretion given to it by the Act will have regard to the intention of the settlor, and also to the wishes and feelings of the remaindermen. (*Re Hope, De Cetto* v. *Hope*, 1899, 2 Ch. 679.)

In *Re Ld. John Thynne*, The Times, 7th July, 1884, an order was made for the sale of three Sèvres vases, valued at 8,000*l.*, for the purpose of paying off mortgages, the income of the settled estates having been seriously reduced.

It has been decided that capital money arising from the sale of these quasi-heirlooms may be applied in discharge of incumbrances under s. 21, sub-s. (ii.), p. 255, *ante;* see note thereon, and *Re D. of Marlborough's Settmt.*, there cited, and *Re Lord Stafford's Settmt.*, *Gerard* v. *Stafford*, 1904, 2 Ch. 72. Also, in payment for authorized improvements; see *Re Houghton Estate*, 30 Ch. D. 102. And in the repair and renovation of other heirlooms consisting of pictures settled by the same settlement and remaining unsold. (*Re Waldegrave, Countess, E. Waldegrave* v. *E. Selborne*, 81 L. T. 632; W. N. 1899, p. 240.) The possibility of such an employment of the proceeds of sale seems to be a matter for consideration when application is made for leave to sell under this section.

It has been held that trustees with a power of sale extending over the whole of the settled land, which therefore included the mansion house, by reference to which the chattels were settled, are trustees for purposes of the Act with reference to those chattels, so as to be able to give a discharge for the purchase-money. (*Constable* v. *C.*, 32 Ch. D. 233.) It would not follow that, if the mansion house had been excepted from their power of sale, they would have been such trustees.

As chattels settled in this manner are not alienable by a tenant for life, no case of election will arise, as against the tenant for life, under a will which confers benefits upon him personally, but purports to dispose otherwise of the settled chattels. (*Re Ld. Chesham, Cavendish* v. *Dacre*, 31 Ch. D. 466.)

On the purchase of a new mansion house, chattels settled to devolve with the old one may be sold, if not suitable to be removed. (*Browne* v. *Collins*, W. N. 1890, p. 78; 62 L. T. 566.)

In *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136, a baronetcy had been limited to a grantee and the heirs male of his body, without naming any place in connection with the dignity; and the grantee by his will bequeathed a service of plate to trustees upon trust to permit the same to be enjoyed in the nature of an heirloom, so far as the rules of law and equity would permit, by such heir male of the testator's body, for the time being, as from time to time, under the said grant, should have inherited the testator's title of a baronet. The service of plate was suitable only to a great establishment, and the grandson of the testator, finding it quite unsuited to his means, and a mere source of useless expense for insurance, &c., desired to sell the plate. On

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an application to the Court for the purpose, made under this section, it was held, (1) That a baronetcy is an "incorporeal hereditament" within the meaning of s. 2, sub-s. (10), (i.), p. 219, *ante;* (2) That a baronetcy is a tenement within the meaning of the statute *De Donis*, although no place is named in the grant in connection with the dignity; and, therefore, that a limitation to the heirs male of the grantee creates an estate tail, and not a conditional fee at the common law; (3) That chattels, given upon trust as above mentioned, were settled on trust to devolve with land, within the meaning of the present section; and (4) That the baronet for the time being had the powers of a tenant for life by virtue of s. 58, sub-s. (1), (i.), p. 322, *post;* and the learned judge acceded to the application, and made an order for the sale of the plate. The decision seems to be not well supported by the cases cited and relied upon. The cases of *Rex* v. *Knollys*, Ld. Raym. 10, Salk. 509, 3 *Ibid.* 242, Comb. 273, Skin. 517, 12 Mod. 55, and *Earl Ferrers' Case*, 2 Eden, 373, do not seem to establish anything with regard to *dignities* generally, but only with regard to *earldoms;* and a characteristic, amounting to a pointed distinction between earldoms and baronetcies, is attributed to the former, when it is said that earldoms are for the defence of the king and realm, and that those offices *extend over all the land.* (Ld. Raym. p. 12, *fin.*, p. 13, *init.* "The earldom is not confined to the place, but extends through the whole kingdom": 12 Mod. p. 60, *init.*) This agrees very well with what is said in *Nevil's Case*, 7 Rep. 33, at p. 33 b, that the earl "by the common law, is a great conservator of the peace, and the sheriffs are called '*Vice-com.*' because, in ancient times, they were as deputies to earls, though now it is changed;" though, in that case, the idea of the almost universal connection of titles of dignity with particular specified places is more prominent. Nothing favourable to the decision can be extracted from the mention of the Earldom of Rivers, in Ld. Raym. 16, and elsewhere, or from *Earl Ferrers' Case, supra.* The distinction in this respect between earldoms and baronetcies, which required at least to be discussed, was not referred to; and doubt may not unreasonably be felt whether the express authority of the resolution reported in 12 Rep. 81, *Honours and Dignities*, that if the king creates a dignitary, and "does not create him of some place, he shall not have an estate tail, but fee simple conditional," ought to be overruled, so far as baronetcies are concerned, upon the ground that it appears not to be applicable to earldoms. This confusion appears to have been carried much further in *Re E. of Aylesford's S. E.*, 32 Ch. D. 162, as to which see note on sect, 36, p. 294, *ante*, where it seems to have been supposed that the case of Sir J. Rivett-Carnac was somehow in point.

Lands purchased with the proceeds of the sale of heirlooms are not subject to charges affecting the settled lands. (*Re D. of Marlb. and Govrs. of Queen Anne's Bounty*, 1897, 1 Ch. 712.)

Where chattels are settled so as to devolve as heirlooms with settled land, trustees may insure them against loss by fire under s. 18 of the Trustee Act, 1893 (*post*, p. 401) and pay the premium for such insurance out of the income of capital moneys

in their hands. (*Re E. of Egmont's Trusts, Lefroy* v. *E. of Egmont*, 1908, 1 Ch. 821.) S. L. A. 1882, Sect. 37.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form VII., App. I., *post*. As to service, see *Re Brown's Will*, 27 Ch. D. 179.

X.—Trustees.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act. Sect. 38. Appointment of trustees by Court.

For the definition of trustees of a settlement "for purposes of this Act," see s. 2, sub-s. (8), p. 218, *ante*. Trustees appointed under this section have the power to give receipts which is conferred by s. 40, *post*. (*Cookes* v. *C.*, 34 Ch. D. 498.)

The words, "if at any time there are no trustees," remove a doubt which once existed as to the practice under the Trustee Acts, 1 3 & 14 Vict. c. 60, s. 32, and 15 & 16 Vict. c. 55, s. 9. (See *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778, and cases there cited.)

Trustees specially appointed for purposes of the Act, and distinct from the trustees of the settlement, can now be appointed under the statutory powers of the Trustee Act, 1893; see s. 47 thereof, p. 428, *post*.

In certain cases, where no trustees of the settlement for purposes of the Act exist, such trustees must be appointed before certain powers given by the Act can be exercised, by reason of the notices required to be given by s. 45, p. 305, *post*, as amended by S. L. Act, 1884, s. 5, p. 341, *post*, and S. L. Act, 1890, s. 7, p. 354, *post*, *e.g.*, where a tenant for life contracts to sell, he cannot compel the purchaser to complete until trustees have been appointed. (*Re Fisher and Grazebrook*, 1898, 2 Ch. 660.) But it has been held that, where persons have been appointed under s. 60, p. 330, *post*, for the purpose of exercising the powers of an infant tenant for life, it is not necessary to appoint trustees under the present section, for the purpose of receiving such notices. (*Re Countess of Dudley*, 35 Ch. D. 338.) In such case the purchase-money must be paid into Court. (*Ibid.*)

As to the appointment of trustees in relation to the property of infants, see s. 59, and note thereon, p. 329, *post*.

Trustees appointed by the Court should be independent

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persons, in order that the interests of remaindermen may be adequately protected. The tenant for life, or a person who might become tenant for life, even if a trustee of the settlement for other purposes, will not be appointed a trustee for purposes of the Act. (*Re Harrop's Trusts*, 24 Ch. D. 717.)

In *Wheelwright* v. *Walker*, 23 Ch. D. 752, at p. 763, Kay, J., refused to appoint the solicitor of the tenant for life, to be a trustee for purposes of the Act, the assignee of the reversioner objecting to the appointment. And even if there is no objection the Court will not make such an appointment, as it is the duty of the trustees to act as a check upon the tenant for life. (See *Re Kemp's S. E.*, 24 Ch. D. 485; *Re E. of Stamford, Payne* v. *Stamford*, 1896, 1 Ch. 288; *Re Spencer's S. E.*, 1903, 1 Ch. 75.) In *Re Knowles' S. E.*, 27 Ch. D. 707, Pearson, J., refused to appoint two relatives as trustees for purposes of the Act.

Trustees having under a will a trust to execute, but not being trustees for purposes of the Act, will not as a matter of course be appointed. (*Re Nicholas & S. L. Act*, W. N. 1894, p. 165.) But it is the usual course to appoint them in the absence of special ground of objection. As to cases where there are several sets of trustees, see *Re Stoneley's Will*, 27 Sol. Journ. 554. As strict proof of fitness is required as though they were not already trustees for any purpose.

In a case where English and Irish estates were comprised in the same settlement, and all the beneficiaries lived in England, the Irish Court appointed, as trustees of the Irish estates for the purposes of the Act, two persons who had been appointed by the English Court trustees of the English estates, although those persons lived in England. (*Re Maberly's S. E.*, 19 L. R. Ir. 341.)

It appears that the Court is not bound to appoint trustees for purposes of the Act, upon the application of the tenant for life, if of opinion that there is no reasonable prospect of a judicious exercise of the statutory powers. (*Williams* v. *Jenkins*, W. N. 1894, p. 176.) The costs of such applications will not be allowed to prejudice mortgagees. (*Ibid.*)

As to the stamping of orders appointing new trustees for purposes of the Act, see *Re Potter*, W. N. 1889, p. 69; *Re Kennaway*, *ibid.*, p. 70.

As to the appointment, in a proper case, of persons resident abroad, see *Re Simpson*, 1897, 1 Ch. 256, cited in note to s. 59, p. 329, *infra*.

For the cases in which the Court considers it expedient to appoint a trustee under the Trustee Act, 1893, see s. 25 and the notes thereto, p. 409, *post*.

It is conceived that the Court will follow the same principles, so far as they are applicable, in appointing trustees under the present section. For a case under the Settled Estates Act, 1877, see *Re Peake's S. E.*, 1894, 3 Ch. 520.

The V.-C. of Ireland, in *Burke* v. *Gore*, 13 L. R. Ir. 367, held that the exercise of the power conferred by this section is optional, and that the Court ought to be satisfied, not only as to

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the fitness of the proposed persons, but also that the object of their appointment is such as to render such appointment safe and beneficial for all the beneficiaries.

New trustees are now appointed on originating summons (R. S. C. 1883, O. LV. r. 13*a*.)

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

A single personal representative of the last trustee could not act in any capacity which would otherwise require the concurrence of more than one trustee. See the next following section.

As to the service of notices in applications to the Court under this section, see S. L. Act Rules, 1882, r. 4, App. I., *post*.

For the form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XIX. App. I., *post*.

A summons may be entitled in the matter of the Act, although a suit is pending for the administration of the settled estate. (*Re Parry*, W. N. 1884, p. 43.)

Sect. 39. Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

It would seem to have been held by Bacon, V.-C., that the fact that the trusts may be exercised by "the trustees *or trustee*" for the time being is sufficient to authorize payment of capital money to a single continuing trustee. (*Re Garnett Orme*, 25 Ch. D. 595.) In the absence of further judicial decision, it will be the only safe course for purchasers under the present Act, where there is a single trustee, not to accept his sole receipt, unless only one trustee (being a trustee for the purposes of the Act) was appointed by the settlement, or the settlement contains a declaration framed on the language of the present section.

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Trustees' receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

Trustees appointed by the Court under s. 38, *ante*, can give receipts under this section. (*Cookes* v. *C.*, 34 Ch. D. 498.)

Sect. 41.

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Trustees, in employing agents, must employ them only in the ordinary course of business, and will incur liability if they should (for example) pay over money to a solicitor for investment, without seeing that the investment is actually made. (*Bostock* v. *Floyer*, L. R. 1 Eq. 26.)

See generally, for remarks as to the liability of trustees for the acts of their agents, *Speight* v. *Gaunt*, 22 Ch. D. 727; 9 App. Cas. 1. A trustee is not liable for fraud committed by a co-trustee, if the innocent trustee has neither done nor permitted anything enabling the fraud to be committed. (See *Barnard* v. *Bagshaw*, 3 De G. J. & S. 355.)

A trustee who is cognizant of a breach of trust committed by a co-trustee, will be bound to take steps to hold him liable.

A trustee will not be at liberty to leave money indefinitely at a bank on a deposit account, unless that is a mode of investment expressly authorized by the settlement. (*Rehden* v.

Wesley, 29 Beav. 213.) The same principle applies to leaving an unduly large balance on a current account. (*Astbury* v. *Beasley*, W. N. 1869, p. 96; 17 W. R. 638.) Also to money left for an unreasonably long time in the hands of a co-trustee uninvested. (*Williams* v. *Higgins*, W. N. 1868, p. 49.) S. L. A. 1882, Sect. 41.

Where a breach of trust is made possible through the negligence or acquiescence of a co-trustee, though the latter cannot escape ultimate liability, the trustee who was actively concerned in the breach of trust is primarily liable. (*Stone* v. *Bennet*, W. N. 1876, p. 152.)

See further, as to the receipt of money by agents appointed by trustees, Trustee Act, 1893, s. 17, and note thereon, p. 400, *post*.

Sect. 42. Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

This section imposes on trustees the duty of seeing that every conveyance of land purports to convey in the proper mode. This seems to refer only to lands acquired by the settlement, and their liability seems to be restricted to seeing that the land purports to be vested in the proper persons to the proper uses. (Cf. *Re Hotham, Hotham* v. *Doughty*, 1902, 2 Ch. 575.) The trustees are, however, entitled to inquire into both the title and value of land which it is proposed to purchase. (*Re Theobald*, 19 Times L. R. 536.)

The protection afforded by this section to trustees is restricted

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to—(1) giving consents; (2) neglecting to take action upon notices received; and (3) dealings with land. It does not embrace any of the other duties cast upon them in connection with the Act, or by the ordinary course of law and equity.

As to the duty of trustees in considering a scheme of improvements submitted to them, see *Re Earl of Egmont's S. E., Lefroy* v. *Earl of Egmont*, 1906, 2 Ch. 151, cited *ante*, p. 275, under s. 26.

Sect. 43. Trustees' reimbursement

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

The trustees here referred to seem to be trustees for purposes of the Act.

Sect. 44. Reference of differences to Court.

[*See s.* 56, *sub-s.* (3), *p.* 320, *post.*]

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

This section includes trustees appointed for purposes of the Act, whether under s. 38, p. 299, *ante*, *Hatten* v. *Russell*, 38 Ch. D. at pp. 343, 344; or expressly appointed by the settlement, whether with or without a power of sale.

Though the trustees are under no duty to control the tenant for life in cases of sale, it would be right for them, if a sale were proceeding of which they did not approve, to submit the matter to the Court (see *Hatten* v *Russell*, *supra*, at p. 344), also where they are directed by the tenant for life to invest in property which they know to be undesirable. (*Re Hunt's S. E., Bulteel* v. *Lawdeshayne*, 1905, 2 Ch. 418; 1906, 2 Ch. 11.)

As to costs, see s. 46, sub-s. (6), p. 307, *post*. It is presumed that the ordinary rule as to trustees' costs will be followed; and that, even when unsuccessful, they will be entitled to their costs, unless their interference has been plainly unreasonable. Costs ordered to be paid out of the *corpus* of the trust estate may be raised by mortgage. (See s. 47, p. 309, *post*.)

As to the services of notices in applications to the Court under this section, see the S. L. Act Rules, 1882, r. 4, App. I., *post*.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XX. App. I., *post;* and see *Re Marq. of Ailesbury and Ld. Iveagh*, 1893, 2 Ch. p. 358, for an order under the section.

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Notice to trustees.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

See S. L. Act, 1884, s. 5, and notes thereon, p. 341, *post*; which enactment has rendered it now unnecessary to specify any particulars, when giving the notices required by this section. (See *Re Ray's S. E.*, 25 Ch. D. 464.)

See also, as to leases not exceeding twenty-one years, S. L. Act, 1890, s. 7, p. 354, *post*.

If there are no such trustees, the tenant for life may be restrained from exercising the powers in this section mentioned, until trustees have been appointed. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.) This ruling seems to have been adopted in *Re Taylor*, W. N. 1883, p. 95; 31 W. R. 596; where a petition by the committee of a lunatic tenant for life, for authority to grant a repairing lease, of a house comprised in the settlement, for ninety-nine years, was ordered to stand over for the appointment of trustees. (See also *Re Bentley, Wade* v. *Wilson* (No. 2), 33 W. R. 610.)

Even if there is no money to be received in consequence of the proposed dealing, a single surviving trustee will not be competent to receive the prescribed notices. (See sub-s. (2) on next page and cf. s. 39, p. 301, *ante*.)

As to notice to solicitors, see the Conv. Act, 1882, s. 3, sub-s. (1) (ii.), and note thereon, p. 187, *ante*. It is not easy to say who is indicated by the phrase, "the solicitor for the trustees." It is conceived that he must be the solicitor, if any, who is, to the knowledge of the tenant for life, usually employed by the trustees in reference to the trust; and that a solicitor appointed for the purpose only of receiving notices, but not otherwise connected with the trust, would not suffice.

It is conceived that the word "or," occurring before the words "of a contract for the same," is not disjunctive; and that if a *binding* contract is concluded before the execution of a

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conveyance, the notice was intended to precede the contract, and that notice merely preceding the conveyance would not suffice. But see note to sub-s. (3), *infra*.

The committee of a lunatic must obtain authority from the Court in Lunacy to give notice under this section. (See *Re Ray's S. E.*, 25 Ch. D. 464.)

The provision requiring notice to be given to the trustees may be useful in preventing a fraud from being committed. (*Re Monson's S. E.*, 1898, 1 Ch. p. 432.)

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

As to what is a "contrary intention," see note to s. 39, *ante*, p. 301.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

It has been held that a purchaser cannot treat as a defect of title the mere fact that the notice has preceded the conveyance and not the contract. (*D. of Marlborough* v. *Sartoris*, 32 Ch. D. 616.) A purchaser is sufficiently protected if, at the time of the execution of the contract, there are trustees to whom he may pay his purchase-money if required so to do; at any rate, if he is not actually aware that due notice has not in fact been given to them. (*Hatten* v. *Russell*, 38 Ch. D. 334.) If there are no trustees at the date of the grant of a lease by the tenant for life, the lease is valid, at least if the lessee had no actual notice of the defect. (*Mogridge* v. *Clapp*, 1892, 3 Ch. 382.) But if he was aware that there are no trustees, a lessee cannot obtain specific performance. (*Hughes* v. *Flanaghan*, 30 L. R. Ir. 111.) And a purchaser who has notice that there are no trustees cannot be compelled to pay the purchase-money into Court under s. 22. (*Re Fisher and Grazebrook*, 1898, 2 Ch. 660.) And it seems that a tenant for life could not obtain specific performance against an unwilling lessee. (*Per* Lindley, L.J., in *Mogridge* v. *Clapp*, *supra*, at p. 395.)

XI.—Court; Land Commissioners; Procedure.

Sect. 46. Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

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(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

The option given by this sub-section has been practically repealed by the S. L. A. Rules, 1882, r. 2, App. I., *post*. But it was held in *Re Bethlehem and Bridewell*, 30 Ch. D. 541, that if an application by petition appears to be more advantageous than by summons, the costs of the petition will be allowed. In that case the Court was dealing with a fund which had been paid in under the Lands Clauses Act; but the ruling seems to be of general application.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such person, if any, as the Court thinks fit.

Notices are prescribed by the S. L. Act Rules, 1882, rr. 4, 5, and 6, App. I., *post*.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property, subject to the settlement.

See note on s. 44, p. 304, *ante*. For the mode of raising these costs, see the next following section.

In *Re Greenville Estate*, 11 L. R. Ir. 138, cited in the note on s. 60, at p. 330, *post*, the costs were allowed out of the purchase-money.

For cases as to costs, see, also, note on s. 21, sub-s. (x.), p. 261, *ante*.

Where remaindermen were served by direction of the Master they were allowed their costs. (*Re Hunt, Pollard* v. *Geake*, W. N. 1900, p. 65; W. N. 1901, p. 144.)

(7.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by 39 & 40 Vict. c. 59.

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section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

44 & 45 Vict. c. 68.

For Rules, dated December, 1882, see p. 543, *post.*

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

Here the words, "acting in," seem to mean, "attached to."

(9.) *General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.*

Sub-s. (9) is repealed by the Statute Law Revision Act, 1898.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

If an order for the sale by auction of chattels under s. 37, p. 294, *ante*, should have been made by a county court, upon the assumption that they are worth less than 500*l.*, the sale ought to be stopped if the biddings should exceed that sum. It is possible that a *purchaser* might be protected by Conv. Act,

1881, s. 70, p. 170, *ante*. Though in that section "the Court" means only the High Court of Justice, and does not include the county court, which has no jurisdiction under that Act, yet since, under the present Act, the county court has not, strictly speaking, a jurisdiction of its own, but exercises "the powers of the Court," its orders may be construed as orders made by the High Court vicariously.

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47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

Sect. 47. Payment of costs out of settled property.

For cases as to costs, see s. 21, sub-s. (x.), p. 261, *ante*.

48.—(1.) *The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.*

Sect. 48. *Constitution of Land Commissioners; their powers, &c.*

(2.) *The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners*

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aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(3.) *Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them.*

(4.) *All Acts of Parliament, judgments, decrees, or orders of any Court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.*

(5.) *All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.*

The foregoing sub-sections are repealed by the Board of Agriculture Act, 1889, 52 & 53 Vict. c. 30. By s. 2, sub-s. (1), (*b*), of that Act are transferred to the Board of Agriculture,

52 & 53 Vict. c. 30, s. 2, sub-s. (1), (*b*).

> "The powers and duties of the Land Commissioners for England under the Acts mentioned in Part II. of the First Schedule to this Act or under any other Act, whether general, local and personal, or private."

By the Documentary Evidence Act, 1895, 58 Vict. c. 9, the provisions of the Doc. Ev. Act, 1868, 31 & 32 Vict. c. 37, and the Doc. Ev. Act, 1882, 45 & 46 Vict. c. 9, are made applicable to the Board of Agriculture.

(6.) The *Land Commissioners* shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled

land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the *Land Commissioners* under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the *Land Commissioners* under any Act, public, local, personal, or private, passed, or to be passed, by which any power or duty is conferred or imposed on them.

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27 & 28 Vict. c. 114.

See the last preceding note.

49.—(1.) Every certificate and report approved and made by the *Land Commissioners* under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

Sect. 49. Filing of certificates, &c. of Commissioners.

See notes on sects. 26, 28, *ante*.

XII.—Restrictions, Savings, and General Provisions.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation

Sect. 50 Powers not assignable; contract not to exercise powers void.

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of law or otherwise, of his estate or interest under the settlement.

The effect of sub-s. (1) is that the powers which a tenant for life enjoys under the Act are not affected by his subsequently concurring in a re-settlement of the estate. (*Re Mundy and Roper's Contract*, 1899, 1 Ch. 275.) *Quære* whether such powers would remain in force after a tenant for life had surrendered his whole estate to the remainderman in fee and thus put an end to the settlement. (*S. C.*) The surrender of a part does not prevent his selling the whole (*Re Barlow's Contract*, 1903, 1 Ch. 382), nor does the surrender of the whole if the original settlement is still kept subsisting in respect of a jointure and portions charged under the powers thereof. (*Lord Wimborne and Browne's Contract*, 1904, 1 Ch. 537.) A tenant for life may exercise his power of leasing after he has aliened his life estate. (*Lonsdale (Earl of)* v. *Lowther*, 1900, 2 Ch. 687.)

The section does not prevent a tenant for life from making any arrangement he pleases for the disposing of his beneficial interest in the property. (*Re Trenchard*, 1902, 1 Ch. 378.)

It is the ordinary rule that a power conferred by a settlement is not destroyed by the alienation of a beneficial interest taken under the settlement by the donee of the power. (*Alexander* v. *Mills*, L. R. 6 Ch. 124.) When the effect of such exercise would be to derogate from the grant of the person having the beneficial interest, the consent of the alienee is necessary. (*Re Cooper, C.* v. *Slight*, 27 Ch. D. 565.) In *Hardaker* v. *Moorhouse*, 26 Ch. D. 417, it was held by North, J., that the consent of an alienee was not necessary to the exercise of a power of appointment of new trustees. The same judge subsequently expressed a doubt whether this view was correct. (*Re Bedingfield*, 1893, 2 Ch. at p. 337.)

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

If the mortgagee of the tenant for life has consented in

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writing to the exercise of the statutory power of sale, the purchaser cannot require that he join in the conveyance. (*Re Dickin and Kelsall*, 1908, 1 Ch. 213.) If the mortgagee be himself the purchaser, the contract for purchase is a consent within the meaning of this sub-section. (*Re Kingsley and Holder's Contract*, 115 L. T. Newsp. 201.)

By the S. L. Act, 1890, s. 4, p. 352, *post*, a charge created by a tenant for life on his life interest in consideration of marriage, or by way of family arrangement, not being a security for money advanced, is not an assignment for value for this purpose. (See *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, approved *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275.)

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

See S. L. Act, 1890, s. 4, sub-s. (1), p. 352, *post*.

"Tenant for life" here means a person who would have been tenant for life if he had not assigned, or otherwise been deprived of, his life interest.

As to leases by a mortgagee in possession of the life interest of the tenant for life, see note on Conv. Act, 1881, s. 18, sub-s. (3), p. 80, *ante*.

The question may arise, whether a common law lease made by a tenant for life, not in exercise of his statutory power, is liable to be over-ridden by a subsequent lease made by the same tenant for life under this Act. The same question also arises with regard to a lease made under s. 18, sub-s. (2) of Conv. Act, 1881, *ante*, by a mortgagee who has entered into possession of the life estate of the tenant for life; because such a leasehold interest is derived out of the life estate, and is liable to be defeated by anything which defeats the life estate. It is conceived that this question must be answered in the negative, notwithstanding the strong language of s. 20, sub-s. (2), of the present Act, p. 250, *ante*, and notwithstanding the fact that the above specified cases do not seem to come within any of the exceptions specified in that sub-section. As to the first case, namely, that of a lease granted by the tenant for life, it seems not to come within the provisions of the present section, the lease not being an assignment; so that, his powers not being expressly preserved to him, it may be inferred that he is *pro tanto* deprived of them by his previous act. And as to both cases, it seems that there is no sufficient obstacle to the applica-

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tion of the maxim, that a man may not derogate from his own grant; though this may be not so clear in the second case as in the first.

In *Re Sebright's S. E.*, 33 Ch. D. 429, the Court of Appeal, affirming the decision of North, J., refused to sanction a sale of a mansion house, on an application under S. L. Act, 1882, s. 15, now replaced by S. L. Act, 1890, s. 10, made without the consent of the tenant for life's mortgagees.

On a sale made by a bankrupt tenant for life under a power contained in the settlement, the consent of the incumbrancers of his life estate and of his trustee in bankruptcy is necessary, (*Re Bedingfield*, 1893, 2 Ch. 332. See also *Re Ailesbury S. E.*, W. N. 1893, p. 140; 42 W. R. 45.) It is conceived that, on a sale by a bankrupt tenant for life under the statutory powers, the consent of his trustee in bankruptcy is not necessary, though he has no doubt the right to apply to the Court, under s. 53, *post*, if he conceives that the sale is fraudulent or at an undervalue.

If a bankrupt tenant for life refuses to exercise his powers, the Court should not confer similar powers on other persons, but should consider the particulars of a scheme presented by the beneficiaries, and order the bankrupt to carry them out. (*Re Mansel's S. E.*, W. N. 1884, p. 209.)

As to the costs of obtaining the consent of the tenant for life's assignee of his life estate, see note on s. 21, sub-s. (x.), p. 262, *ante*.

If a tenant for life of land is also the owner in fee simple of adjoining land, he cannot, by his dealings with the adjoining land, lessen or restrict his statutory powers over the settled land. (*Fass* v. *Gunter*, 30 Sol. Journ. 726.)

Sect. 51. Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts,

or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

This section is not confined to attempts made by the settlor himself to restrain the tenant for life under the settlement from exercising his powers, but extends also to attempts made by other persons, or (which is practically the same thing) made by the same settlor in a separate instrument. With this object the words "will, assurance, or other instrument," are added to "settlement."

Personal estate was bequeathed in trust to pay the income to the tenant for life of lands settled by the same will, while in receipt of the rents and profits thereof. It was held that he was entitled to the income after having sold the lands under his statutory powers. (*Re Ames, A.* v. *A.*, 1893, 2 Ch. 479.)

A gift over on ceasing to reside in a particular mansion house, being part of the settled land, may be defeated by an exercise of the statutory power of sale. (*Re Paget's S. E.*, 30 Ch. D. 161; *Re Dalrymple, Bircham* v. *Springfield*, 49 W. R. 627.) And a proviso by a testator that an annuity to his widow shall be reduced upon her ceasing to reside in a house which under the will she is entitled to occupy is void (*Re Eastman's S. E.*, W. N. 1898, p. 170), or ceasing to reside there and maintain a person named. (*Re Richardson*, 1904, 2 Ch. 777.) And so is a gift over of personal estate upon a sale of real estate settled by the will of another testator (*Re Smith, Grose-Smith* v. *Bridger*, 1899, 1 Ch. 331), or a gift over of personal estate in the event of the beneficiary ceasing to reside in a house. (*Re Fitzgerald, Brereton* v. *Day*, 1902, 1 I. R. 162.) But there is nothing to prevent a settlor from obliging a tenant for life to reside in such mansion house until it shall be sold, leased, or otherwise disposed of, by exercise of the statutory powers. (See *Re Haynes, Kemp* v. *Haynes*, 37 Ch. D. 306, and *Re Edwards' Settlement*, 1897, 2 Ch. 412.) Such a condition is void only so far as it tends to prevent her from exercising her powers under the Act. (*Re Trenchard*, 1902, 1 Ch. 378.)

The only form of restraint on alienation which is forbidden by this section is restraint on alienation of *the settled land*, not restraint on alienation of *the income of the tenant for life* derived therefrom, or from the proceeds of investments representing the

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same, or from the improved value of other settled land owing to improvements made with capital moneys arising under the Act, &c.

A trust to sell the life estate, coupled with a covenant on the part of the tenant for life not to retain the life estate *in specie*, will not deprive him of his statutory powers. (*Re Hale and Clark*, W. N. 1886, p. 65; 34 W. R. 624.)

A settlement made in 1877 provided for a sinking fund out of income to recoup moneys expended in improvements. Under such circumstances, if a tenant for life expends moneys under the settlement instead of under the Act, he is not relieved by this section from his liability to keep up the sinking fund. (*Re Sudbury &c., Vernon* v. *V.*, 1893, 3 Ch. 74.) But this is without prejudice to any application under S. L. Act, 1890, s. 15.

Sect. 52. Provision against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

See note on last section, and *Re Paget's S. E.* there cited.

Sect. 53. Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

This section alters the position of the tenant for life in reference to the other persons interested under the settlement, so far as the Act gives him increased powers. A tenant for life is not in general a trustee for them, as to improvements which he may make in the estate. (See *Re E. of Berkeley's Will*, L. R. 10 Ch. 56, at p. 59.)

It follows from the fiduciary position of the tenant for life that, except so far as regards purely ministerial functions, such as completing a definite contract, he cannot exercise his powers through an attorney.

In so far as any additional powers given by the settlement to the tenant for life are co-extensive with, or exceed, the powers conferred upon him by the Act, he can, of course, exercise them without complying with the conditions, or being subject to the liabilities, imposed upon him by the Act in regard to the exercise of his statutory powers. Such additional powers are cumulative. (See s. 56, sub-s. (1), p. 319, *post*.)

"I think that the meaning of the 53rd section is that, for the security of the remaindermen, as between the tenant for life and them, he, in exercise of this power, shall be treated as a trustee, and shall have all the liabilities of a trustee exercising a like power. The consequence of that is, no doubt, that if a purchaser knows that a tenant for life is exercising the power

improperly, and is aware that what the tenant for life is doing would amount to a breach of trust, he, the purchaser, has a perfect right to say, I will not complete." (*Per* Kay, J., in *Hatten* v. *Russell*, 38 Ch. D. 334, at p. 345.)

A tenant for life, who happens to be a total abstainer, is not justified in taking steps to extinguish licences of public-houses forming part of the settled property. (*Re E. Somers, Cocks* v. *Somerset*, 11 Times L. R. 567.)

The discretion of the tenant for life as to the application of capital moneys ought to prevail (*Re Ld. Stamford's S. E.*, 43 Ch. D. 84), unless there is reason to suppose that he is exercising his discretion unfairly. (*Re Hunt's S. E., Bulteel* v. *Lawdeshayne*, 1905, 2 Ch. 418. And see *Re E. of Egmont's S. E., Lefroy* v. *E. of Egmont*,, 1906, 2 Ch. 151.)

In exercising his powers, the tenant for life should consider the interests of all persons concerned, including the tenants on the estates (*Bruce* v. *Marq. of Ailesbury*, 1892, A. C. 356), even though the result may possibly prejudice the interest of a tenant in tail. (*Re Ld. Stafford's Settlement, Gerard* v. *Stafford*, 1904, 2 Ch. 72, 83.)

As to the exercise of discretion in selling heirlooms, see *Re E. of Radnor's Will Trusts*, 45 Ch. D. 402, and the other cases cited in the note to s. 37, *ante*, p. 296.

The mere fact that the tenant for life personally will derive a benefit from the exercise of his powers, and that it may be to the detriment of the remainderman, is no objection (*Re Ld. Stamford's Estate*, 56 L. T. 484; *Re Hare, Leycester-Penrhyn* v. *Leycester-Penrhyn*, 43 L. J. Newsp. 659), provided he is acting honestly in the interests of all parties. (*Re Richardson, Richardson* v. *R.*, 1900, 2 Ch. 778.)

But the tenant for life may not grant a lease to his wife, to confer upon her a benefit at the expense of the remaindermen. (*Dowager Duch. of Sutherland* v. *D. of S.*, 1893, 3 Ch. 169.) Whether he may grant a lease to her at all has been questioned, but such a lease has been held to be valid. (*Gilbey* v. *Rush*, 1906, 1 Ch. 11.) And a tenant for life during widowhood cannot grant a lease to the man she is about to marry. (*Middlemas* v. *Stevens*, 1901, 1 Ch. 574.)

And where income was to be accumulated for the payment off of incumbrances, the tenant for life was not allowed to exercise his discretion to pay off the incumbrances out of other capital money, so as to entitle himself to the accumulations. (*Re Wharncliffe's Trusts*, 116 L. T. Newsp. 240.)

A tenant for life is not justified in trying to preserve a heavily incumbered estate by mortgaging it under S. L. Act, 1890, s. 11, if he thereby sacrifices the interests of existing incumbrancers. (*Hampden* v. *E. of Buckinghamshire*, 1893, 2 Ch. 531.) But this is the furthest that the Court has gone in controlling the discretion of the tenant for life. (*Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778, 790.)

Although a tenant for life is by this section made a trustee in a certain sense, it does not follow that he is in all cases entitled

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to trustees' ordinary costs. (See *Sebright* v. *Thornton*, W. N. 1885, p. 176.) The section imposes upon him the responsibilities without conferring upon him the rights of a trustee. (*Re Llewellin*, 37 Ch. D. 317, 325.)

A bribe given by the lessee to the tenant for life affords sufficient ground for setting aside the lease at the suit of the remaindermen, whether the latter have been damnified or not. (*Chandler* v. *Bradley*, 1897, 1 Ch. 315.)

Sect. 54. General protection of purchasers, &c.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

The protection given by this section to dealings "with a tenant for life" no doubt extends to dealings with trustees exercising powers on behalf of persons under disability, and "limited owners" who "have the powers of a tenant for life." (See ss. 58, 60—62, *post*.)

This section refers only to the *amount* of the price, &c., and does not exonerate the person liable to pay it from seeing that it is paid to the proper person, or in the proper way.

As the title of the purchaser depends upon his having dealt with the tenant for life in good faith, and this is a question of fact, such a title is not one which another can be forced to accept. (*Re Handman and Wilcox*, 1902, 1 Ch. 599.) But the purchaser is protected by the section if he acted in good faith, and the mere fact that he bought at an under-value will not invalidate the sale. (*Hurrell* v. *Littlejohn*, 1904, 1 Ch. 689.)

Sect. 55. Exercise of powers; limitation of provisions, &c.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the *Land Commissioners* are exerciseable from time to time.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to

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sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

See s. 48, p. 309, *ante*, and note thereon.

On the question, whether deeds executed or taking effect under the Act must be expressed to be made in exercise of the statutory powers, see notes at p. 250, *ante*, and p. 322, *post*.

Sect. 56. Saving for other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

Tenant for life retains powers conferred by the Lands Clauses Act, 1845; and on a purchase under the Act can insist on conveying thereunder. (*Lady Bentinck* v. *L. and N. W. R. Co.*, 12 Times L. R. 100.)

Where under a settlement made prior to 1882 the tenant for life has a wider power of leasing mines than that conferred upon him by the Act of 1882, and after 1882 he grants a lease "in exercise of every power or authority enabling him in that behalf," he will be presumed to have executed the power under the settlement and the statutory restrictions will therefore not apply. (*E. Lonsdale* v. *Lowther*, 1900, 2 Ch. 687.)

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred

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by the settlement exerciseable for any purpose provided for in this Act.

The "conflict" here referred to means a conflict between provisions connected with the execution of the power—*e.g.*, the consent of a third party—and not with the result or subject matter of the power. (*E. Lonsdale* v. *Lowther*, 1900, 2 Ch. 687.)

A private Act of Parliament which confers upon the trustees certain powers of developing and managing the estate, but does not incorporate the settlement or create any limitations, is not part of "the settlement" within the meaning of this section, and no consent by the tenant for life to the exercise of such powers by the trustees is necessary. (*Talbot* v. *Scarisbrick*, 1908, 1 Ch. 812.)

Where a power of sale is given to the trustees of the whole estate, but undivided shares are separately settled, there is a conflict within the meaning of the section, and the consents of all the persons who are tenants for life are required for the exercise of the power of sale by the trustees. (*Re Osborne and Bright's, Ltd.*, 1902, 1 Ch. 335.)

Where the tenant for life is a lunatic not so found, the person appointed to manage his affairs under s. 116 of the Lunacy Act, 1890, cannot consent on his behalf. (*Re Moleyns and Harris*, 1908, 1 Ch. 110.)

Where the cost of improvements is by the will thrown on the income of the tenant for life, there is a conflict between the provisions of the settlement and the provisions of the Act within the meaning of this sub-section, and the provisions of the Act are to prevail, and such costs are consequently to be borne by the capital. (*Clarke* v. *Thornton*, 35 Ch. D. 307, 315, approved in *Re Ld. Stamford's S. E.*, 43 Ch. D. 84, 96, and in *Re Thomas*, *Weatherall* v. *Thomas*, 1900, 1 Ch. 319.)

A distinction has, however, been made in a case where the settlement contained a trust for improvements being paid for out of income before any payment is made to the tenant for life, and in such a case it was held that the expenses of the improvements must be borne by the income. (*Re Partington*, *Reigh* v. *Kane*, 1902, 1 Ch. 711.)

See now S. L. Act, 1884, s. 6, and notes thereon, p. 343, *post*.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

The general result of this section is, that the tenant for life may, at his option, exercise powers given to him either by the

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settlement or by the Act, and that the trustees may exercise powers given to them by the settlement; but the consent of the tenant for life is necessary to the exercise by them of any powers which embrace any of the objects embraced by any of the powers conferred by the Act. (See *Re D. of Newcastle's Estates*, 24 Ch. D. 129; *Re Atherton*, W. N. 1891, p. 85.)

The consent of the tenant for life, when given under this section, should be expressed in any deed to the validity of which it is requisite, and he should execute the deed.

An equitable tenant for life, whose consent is necessary to a sale, must enter into the usual limited covenants for title. (*Re Sawyer*, W. N. 1884, p. 192, 33 W. R. 26.)

If an order for sale has been made by the Court under the Settled Estates Act, 1877, the Court may in its discretion stay the order, but until and unless this has been done, the tenant for life cannot sell under the present Act. (*Re Barrs-Haden's S. E.*, W. N. 1883, p. 188, 32 W. R. 194.) And if, under the Settled Estates Act, the Court has authorized trustees to exercise certain powers of leasing, the tenant for life, before exercising his powers under this Act, must apply to the Court to stay the operation of the order. (*Re Poole's S. E.*, 32 W. R. 956.)

For form of summons applicable to this section (for advice and direction), see Appendix to the S. L. Act Rules, 1882, Form XXI. App. I., *post*.

In view of the general provisions contained in s. 44, p. 304, *ante*, the third sub-section seems to be unnecessary.

Sect. 57. Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

If a settlor desires to exempt the tenant for life from any of the restrictions imposed by the Act, he must be careful, in conferring more extended powers, expressly to declare such intention; because the restrictions might otherwise be imposed by this section upon the exercise of the extended powers.

As to powers given by the settlement to trustees, see s. 56 and note thereon, *ante*.

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XIII.—Limited Owners generally.

Enumeration of other limited owners, to have powers of tenant for life.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

See also the Glebe Lands Act, 1888, s. 8, sub-s. (4), cited p. 226, *ante*, which confers upon incumbents the statutory power of sale of a tenant for life.

The section only applies to beneficial owners. Consequently trustees with an estate *pur autre vie* cannot exercise a tenant for life's powers under sub-s. (v.). (*Re Jemmett and Guest*, 1907, 1 Ch. 629.)

This section does not include a tenant in dower; and it seems not to include a husband seised in fee simple in right of his wife. These, however, may make leases for twenty-one years under the Settled Estates Act, 1877, s. 46.

The "powers of a tenant for life" seem to include powers to give consents and to exercise options, in addition to powers properly so called.

In this section "in possession" is distinguished from "in remainder" and "in reversion." (*Per* North, J., in *Re Morgan*, 24 Ch. D. 114; where, however, some confusion seems to have prevailed between a tenant in fee simple subject to an executory limitation, and a person who may at some future time, by virtue of an executory limitation, become a tenant in fee simple.) The section applies to persons in possession, though under disability. (*Ibid.*)

It is probable that any act done by a person having the powers of a tenant for life, which does not expressly purport to be done in exercise of his statutory powers, but is within their scope, will be taken to have been done in exercise of the powers; because a contract, conveyance, or other assurance cannot be presumed to have been intended to be made *ultra vires*, and the existence of the statutory powers is sufficiently notorious to raise a presumption that they were present to the minds of the parties to the deed.

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he

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is so restrained was purchased with money provided by Parliament in consideration of public services:

A tenant in tail in possession who is *sui juris*, unless the remainder or reversion on his estate tail is vested in the Crown, or unless he is restrained by some special Act of Parliament, can defeat the entail and all subsequent provisions of the settlement by virtue of the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74. The practical effect is, to vest in himself, or his grantee, any estate not greater than the estate of the settlor who created the entail; which is usually a fee simple. The operation of the present enactment will probably be almost confined in practice to tenants in tail who are under some disability, either at common law or by statute. As to the disability of infancy, see s. 60, p. 330, *post*. As to marriage, see s. 61, p. 331, *post*. As to lunacy, see s. 62, p. 332, *post*.

The powers given to a tenant in tail by this section do not make him a person capable of alienating the settled lands within the meaning of the Finance Act, 1894, s. 5 (5). (*Re Bolton Estates Act, Russell* v. *Meyrick*, 1904, 2 Ch. 289.)

If the remainder or reversion is vested in the Crown, the tenant in tail could not, at common law, defeat the estate of the Crown by suffering a common recovery, though he might thereby bar the claim of the issue in tail and create a base fee. (Challis, R. P. 2nd ed. p. 300, No. 6 of the list there given.) But by the "Act to embar feigned recovery of lands wherein the King is in reversion," 34 & 35 Hen. 8, c. 20, s. 2, recoveries suffered by such tenants in tail were made void as against the heirs in tail. Such tenants in tail also cannot make any disposition under the Fines and Recoveries Act; see s. 18 thereof. See further as to the 34 & 35 Hen. 8, c. 20, the note on sub-division (iii.) of this section, *infra*.

In many private Acts of Parliament obtained for the purpose of settling lands held by a settlor, or person on whose behalf the settlement is obtained, for a fee simple, a special clause is inserted to restrain any tenant in tail under the settlement from defeating the entail by virtue of the powers given to tenants in tail by the Fines and Recoveries Act.

But for the express provision contained in the present enactment, it is conceived that neither tenants in tail restrained by the Act to embar Feigned Recoveries, nor those restrained by special provisions contained in private Acts, would have been able to exercise the powers of tenant for life under the present Act.

In the eye of the common law, lands given to a subject for an estate tail, the Crown retaining the reversion within the meaning of the 34 & 35 Hen. 8, c. 20, were viewed in much the same light as the lands given in more modern times out of moneys provided by Parliament, in reward of public services; which last alone are now protected from alienation, &c., by the tenant

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in tail for the time being. A doubt was expressed in an earlier edition of these notes whether the Blenheim estates come within this last description, since they were settled by statute at the request of the first Duke, who was at the time actually seised in fee simple. (*Davis* v. *Duke of Marlborough*, 1 Swanst. 74, at p. 82.) Chitty, J., subsequently held that this doubt was well founded. (*Re Duke of Marlborough's Blenheim Estates*, 8 Times L. R. 582.) See further, as to the Honour and Manor of Woodstock and the Hundred of Wootton, 3 & 4 Anne, c. 6; 5 Anne, c. 3; *Att.-Gen.* v. *Duke of Marlborough*, 3 Madd. 498. These, moreover, were not, properly speaking, purchased with money provided by Parliament, but, being the property of the Crown, were, with the assent of Parliament, granted to the Duke. As to Strathfieldsaye, see 54 Geo. 3, c. 161.

It has been held by Chitty, J., in *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136, that under the limitation of a baronetcy to a grantee and the heirs male of his body, without any place being named in connection with the dignity, the baronet for the time being is tenant in tail of the dignity. See further on this case, note on s. 37, at p. 297, *ante*.

(ii.) A tenant in fee simple, with an executory limitation, gift or disposition over, on failure of his issue, or in any other event:

The sub-section includes the case of a devise to a person on condition that she resides in the testatrix's house during the life of X. and provides there a home for X. (*Re Richardson*, 1904, 2 Ch. 777.)

See Conv. Act, 1882, s. 10, p. 198, *ante*, as to the avoidance of an executory limitation, which is in defeasance of a fee simple on failure of issue, so soon as any issue of the prescribed class shall have attained the age of twenty-one years.

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

On base fees generally, see Challis, R. P. Chap. XXII.

The above-mentioned Act to embar Feigned Recoveries, 34 Hen. 8, c. 20, made it impossible in England for any estate tail upon which the Crown had a remainder or reversion within the meaning of that Act, to be turned to a base fee by fine or recovery. But the remainders and reversions there contemplated are only those subsisting upon estates tail created by the Crown by way of *provision or gift in reward of meritorious service* done by its subjects: not such as accrued to the Crown in any other manner. (See Co. Litt. 372 b, 373 a, where that Act is exhaustively discussed.) If the reversion was once

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severed from the Crown, and taken back again, it was no longer within the protection of the statute. (*E. of Chesterfield's Case*, Hardr. 409.) The Act did not extend to Ireland. (Lord Nott. MSS., cited Butl. n. 3, on Co. Litt. 372 b.) Therefore in England base fees upon which the reversion is in the Crown, must either be of older creation than the 34th of Hen. 8, or else must have had their origin by methods not within the purview of the Act, which have long been wholly disused in practice. If at this day there are in England any such base fees, it is not probable that they are known to exist. But such base fees undoubtedly exist in Ireland, where no obstacle was opposed to their creation.

Lord Coke (*ubi supra*) expressly mentions that fines were as much within the above cited Act as recoveries.

The present enactment, like sub-division (i.), *supra*, makes no mention of remainders. It is probable that no such remainders are known to exist in England. Stat. West. 2, c. 3, speaks only of reversions, but extends also to remainders. (Co. Litt. 280 b.)

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

The phrase "determinable on life" seems to mean "determinable on the dropping of a life or lives."

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

A purchaser of the whole estate of a tenant for life under a settlement would be a tenant for the life of another, and would not hold "merely under a lease at a rent." But the whole section seems to contemplate only beneficial interests arising under a settlement; and it would probably be held that s. 50, sub-s. (1), p. 311, *ante*, prevents such a purchaser from exercising the statutory powers.

The executors of a deceased next of kin and the surviving next of kin who are entitled under the Thellusson Act to the rents of real estate which have been directed to accumulate beyond the period allowed by the Act have collectively clearly the powers of a tenant for life under sub-s. (v.). (*Vine* v. *Raleigh*, 1896, 1 Ch. 37.) But in *Re Jemmett and Guest*, 1907, 1 Ch. 629, it was held that s. 58 only applies to beneficial owners, and that trustees with an estate *pur autre vie* cannot exercise the powers of a tenant for life under sub-s. (v.).

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation,

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gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

There is nothing in this provision expressly to except from its purview such tenants as hold "merely under a lease at a rent;" but for the reasons given in the last preceding note, such tenants seem not to be within its purview.

"Conditional limitation" seems here to be restricted to mean only what may more conveniently be styled a determinable limitation at the common law. (Challis, R. P. 2nd ed. 225, 226.) The phrase is sometimes used to include also executory limitations and contingent remainders. But here the former are explicitly mentioned, and the latter are excluded by the nature of the context.

Semble, sub-s. (vi.) does not apply to a person merely entitled to receive surplus rents from trustees who are in possession and managing the estates. (*Re Baroness Llanover*, *Herbert* v. *Ram*, 1907, 1 Ch. 635.) Where, however, real estate was devised on trust to pay an annuity to the testator's widow during widowhood, and to accumulate the residue of the rents during her life, such accumulations to fall into residue, it was held that the residuary legatees had the powers of a tenant for life even before twenty-one years had elapsed from the testator's death. (*Re Drinkwater's S. E.*, 49 Sol. Journ. 237.)

For a case where a tenant for life was held to be entitled to exercise the powers conferred by the Act although his enjoyment of the estate was intercepted by a provision for the accumulation of income, see *Annesley* v. *Woodhouse*, 1898, 1 I. R. 69, also *Re Martyn, Coode* v. *Martyn*, 69 L. J. Ch. 733.

If a person is entitled to receive the rent reserved on a lease of a settled estate, which may determine during the life of such person, coupled with a provision that on such determination the lands shall be sold, and an annuity equal to the rent provided for such person during the rest of his life, such person has not the powers of a tenant for life of the settled estate within the meaning of the Act. (*Re Hazle's S. E.*, 29 Ch. D. 78.)

A daughter was tenant for life under her father's will, subject to a direction that if a claim for 1,000*l.* arising under her marriage settlement should be enforced, as it afterwards was, "all her interest and benefit from the estate" should "cease until the debts and claims on the same" should have been paid: held, that on such enforcement her life estate was suspended only, and that, pending payment of the debts, she could exercise the statutory powers. (*Williams* v. *Jenkins*, 1893, 1 Ch. 700.) By means of an implied trust for payment of the debts by accumulation of the rents, she was brought within the last words of this sub-section.

A devise by a testator to his wife during widowhood for the benefit and maintenance of herself and her children and the

proper bringing up of the latter is within sub-s. (vi.). (*Re Pollock*, 1906, 1 Ch. 146.) S. L. A. 1882, Sect. 58.

If a widow, having no estate, but having the right to reside in a house during widowhood, concurs with other persons in making a lease of the house, she has not, during the continuance of the lease, the statutory powers of a tenant for life. (*Re Edwards' Settmt.*, 1897, 2 Ch. 412.) In that case, Stirling, J., stated that, if the lease should determine, and she should go into residence, she would have the statutory powers. Perhaps *Re Paget's S. E.*, 30 Ch. D. 161, is hardly an authority for that proposition, because in that case the son had a legal estate for his own life, so long as he fulfilled the prescribed condition of residing in the house during a portion of each year. However, it has now been held that permission by a testator to his widow to occupy the mansion house as long as she pleases constitutes her tenant for life within the Act. (*Re Eastman's S. E.*, W. N. 1898, p. 170; *Re Carne's S. E.*, 1899, 1 Ch. 324; *Re Baroness Llanover's Will, Herbert* v. *Freshfield*, 1902, 2 Ch. 679; 1903, 2 Ch. 16.) There must, however, be a direction to permit a specified person to reside in a specified house, so that a direction to permit the testator's son, his wife and children, to reside rent free in any one of the testator's houses, did not put the beneficiaries in the position of persons having the powers of a tenant for life. (*Re Bond's Estate, Burrell* v. *Bond*, 48 Sol. Journ. 192.)

(vii.) A tenant in tail after possibility of issue extinct:

As to the origin of such tenancy, see Challis, R. P. 2nd ed. 263. Such tenant in tail is not at common law impeachable for waste, though his assigns are. He could not suffer a common recovery, and cannot now bar the entail under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74. See s. 18 thereof.

(viii.) A tenant by the curtesy:

See S. L. Act, 1884, s. 8, and note thereon, p. 347, *post*.

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

This was perhaps inserted with a view to the remarks of Jessel, M.R., in *Taylor* v. *T.*, L. R. 20 Eq. at p. 304; which were criticised by James, L.J., S. C. 3 Ch. D. at pp. 146, 147.

The person who would be entitled to the surplus income, if

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there were any, has the statutory powers of a tenant for life, although the whole income is in fact exhausted by charges, &c. (*Re Jones*, 26 Ch. D. 736; *Re Cookes' S. E.*, W. N. 1885, p. 177.)

As to a discretionary trust for payment of rents and profits among a class, see *Re Atkinson, A.* v. *Bruce*, 31 Ch. D. 577; and see note on s. 2, sub-s. (6), p. 217, *ante*.

Where several persons are together entitled to the whole income they are persons having together the powers of a tenant for life. (*Re Bennet*, 1903, 2 Ch. 136.)

If a testator has directed his trustees to manage his estates for twenty years, and to accumulate the surplus rents, and at the end of that period to settle the estates and accumulation on the trusts of another settlement under which the testator's son is tenant for life, the testator's son has not the powers of a tenant for life as regards the estates devised by the will during the continuance of the trust for accumulation. (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423. *Cf. Re Martyn, Coode* v. *Martyn*, 69 L. J. Ch. 733.)

But where a testator created a long term in his estates, and directed his trustees to pay certain annuities, and to apply the surplus rents in discharging incumbrances, and subject thereto devised his estates to one for life, it was held that the devisee for life had the powers of a tenant for life, because the charges might be redeemed at any moment. (*Re Clitheroe Estate*, 31 Ch. D. 135; followed in *Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778; *Re Money Kyrle*, 1900, 2 Ch. 839.)

But, *semble*, sub-s. (ix.) does not apply to (a) a terminable life interest, or (b) any interest taken under an intestacy though comprised in the subject of the settlement under s. 2 (2). (*Re Baroness Llanover, Herbert* v. *Ram*, 1907, 1 Ch. 635.)

If there is a gift to an infant, contingently upon his attaining a certain age, he has not the powers of a tenant for life pending the contingency. (*Re Horne's S. E.*, 39 Ch. D. 84; which must be taken to have overruled *Re Powell, Allaway* v. *Oakley*, W. N. 1884, p. 67, unless in the latter case the gift to the infants was taken to be vested, and not contingent.)

Cases which are covered by s. 63, *post*, ought not to be treated as coming within this sub-section. (*Re Crips, Crips* v. *Tod*, 95 L. T. 865.)

Repairs of buildings on a settled estate, and of the chancel of a church, are "expenses of management" within the meaning of this sub-section. (*Re Bentley, Wade* v. *Wilson*, No. 2, 33 W. R. 610.)

A person entitled for life in the manner described in this sub-section has the powers of a tenant for life, although, for want of appropriate subsequent limitations, no "succession" is created within the meaning of s. 2, sub-s. (1), p. 209, *ante*. (*Re Pocock and Prankerd*, 1896, 1 Ch. 302.)

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring

powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised. S. L. A. 1882, Sect. 58.

See S. L. Act, 1884, s. 8, and note thereon, p. 347, *post.*

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

XIV.—Infants; Married Women; Lunatics.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof. Sect. 59. Infant absolutely entitled to be as tenant for life.

This section provides for a much more liberal dealing with infants' lands than the Court has ever exercised under its ordinary jurisdiction. (See *Re Jackson, J.* v. *Talbot*, 21 Ch. D. 786.)

An executory limitation, so long as it remains executory, does not interfere with the seisin of the person who is seised subject thereto. An infant devisee of land will therefore come within this section, although the devise is subject to a gift over in case of his death before attaining twenty-one years.

An infant who has a vested equitable estate in land, liable to be devested on death under the age of twenty-one years, is a tenant for life within the meaning of the Act. (*Re James*, W. N. 1884, p. 172, 32 W. R. 898.) But not if he has a contingent estate. (*Re Horne's S. E.*, 39 Ch. D. 84.)

If an infant is entitled in fee subject to his mother's right of dower, and she agrees to release her right as against the lands while retaining it as against proceeds of the sale of them, the Court can appoint persons to exercise the statutory powers on the infant's behalf. (*Re McClintock*, 27 L. R. Ir. 462.)

If trustees are appointed under the Act for the purpose of selling an infant's lands, the estate being administered by the Court, the sales may be directed to be made out of Court. (*Re Price, Leighton* v. *Price*, 27 Ch. D. 552.)

The Court has jurisdiction to appoint persons resident abroad to be trustees for purposes of the S. L. Acts of an undivided share of land in England to which an infant domiciled abroad is entitled, and to permit the infant's share of the proceeds of

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the sale of the land to be remitted to them for investment abroad. (*Re Simpson*, 1897, 1 Ch. 256.)

As to infant married women, see note on s. 61, *post*.

In cases of partnership, where real estate belonging to the partnership is held to be converted in equity and to go to the next of kin of a partner dying intestate (as to which see Lindley on Partnership, bk. iii. ch. 5, s. 1), all or some of whom are infants, the Court has jurisdiction, while the property remains in fact unconverted, to appoint trustees for purposes of the Act so far as the shares of infants are concerned. (*Re Wells*, W. N. 1883, p. 111, 31 W. R. 764.)

Sect. 60. Tenant for life, infant.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

As to consents to be given on behalf of infants, to the exercise of powers conferred by settlement on the trustees, see note on s. 2, sub-s. (5), p. 215, *ante*. The consent of the testamentary guardians of the infant is not required. (*Re D. of Newcastle's Estates*, 24 Ch. D. 129, at p. 142.)

As to the completion of contracts where the "successor in title" of the person contracting is an infant, see note on s. 31, sub-s. (2), at p. 284, *ante*.

The exercise of statutory powers should be expressed to be done on the infant's behalf; because the powers remain vested in the infant, though, by virtue of this section, they may be exercised by the trustees.

In *Re Greenville Estate*, 11 L. R. Ir. 138, the Court refused to appoint the uncle of an infant absolutely entitled to an individual share, who was also a co-owner with the infant, to exercise on the infant's behalf the power of concurring in a sale of the entirety. An independent person, not a relation, was ultimately appointed; and the infant's share of the purchase-money was ordered to be paid into Court.

Trustees, acting in the place of an infant tenant for life, who have previously obtained from the Court powers under the Settled Estates Act, 1877, must apply by petition to stay the operation of the order before exercising the powers conferred by the S. L. Act. (*Re Poole's S. E.*, 32 W. R. 956.)

It has been held that where persons have been appointed

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under this section for the purpose of exercising the powers of an infant tenant for life, it is not necessary to appoint trustees under s. 38, p. 299, *ante*, for the purpose of receiving the notices referred to in s. 45, p. 305, *ante*, as amended by the S. L. Act, 1884, s. 5, p. 341, *post*. (*Re Countess of Dudley*, 35 Ch. D. 338.) But the purchase-money must be paid into Court. (*S. C.*)

The Court has jurisdiction to authorize trustees appointed under this section to sell the land out of Court. (*Re Price, Leighton* v. *Price*, 27 Ch. D. 552.)

Trustees acting on behalf of an infant tenant in tail in possession under this section may prepare and approve their own schemes of improvements during the minority. (*Re Grey's Court Estate*, W. N. 1901, p. 60.)

The section does not constitute the trustees trustees with a power of sale of the settled lands under s. 42 of the Conveyancing Act, 1881, so as to entitle them to possession during the minority of the infant, and affords no answer to an application by the testamentary guardian under 12 Car. 2, c. 24, for possession. (*Re Helyar*, 1902, 1 Ch. 391.)

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XXII. App. I., *post*.

Sect. 61. Married woman, how to be affected.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

Married women who are absolutely entitled, subject to a restraint on anticipation, are not tenants for life under the Act by reason of the estate by the curtesy given to their husbands by the general law. (*Bates* v. *Kesterton*, 1896, 1 Ch. 159.) But where land is limited to trustees on trust for a married woman for her life for her separate use without power of anticipation, and after her death to such uses as she shall by will appoint, and in default to the use of herself in fee, she has the powers of a tenant for life within s. 58 (1) (ix.). (*Re Pocock and Prankerd's Contract*, 1896, 1 Ch. 302.)

S. L. A. 1882, Sect. 61.

As any conveyance made by a married woman under this Act would be in the nature of the exercise of a statutory power, and would not be a conveyance under the Fines and Recoveries Act, it is conceived that separate acknowledgment is not necessary.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

This section seems not to include the case of an infant married woman. Sect. 60, p. 330, *ante*, is undoubtedly among the "foregoing provisions," which by virtue of sub-s. (1) of the present section, "do not apply" to her. These foregoing provisions are brought back, by sub-ss. (2) and (3) of the present section, so far as they confer powers upon a tenant for life; but s. 60 cannot be brought under this description. It will be necessary to hold that s. 60 is incorporated by sub-s. (4) of the present section, as being a "provision . . . . referring to a tenant for life," though that construction presents considerable difficulty. In cases where the powers are exerciseable by the wife and husband together, the difficulty may perhaps prove to be insuperable. Sect. 60 applies only where the "person having the powers of a tenant for life is an infant;" and in that case such person is constituted by, or composed of, the wife and husband jointly, who do not together constitute or compose "an infant."

Sect. 62. Tenant for life, lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the

persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate. S. L. A. 1882, Sect. 62.

The application will now be by summons, unless the judge otherwise directs. (Rules in Lunacy, 1892, r. 20, replacing Rules in Lunacy, 1890, r. 16.)

The committee of a lunatic tenant for life must obtain authority from the Court in Lunacy before giving notice of intention to exercise the statutory powers. (*Re Ray's S. E.*, 25 Ch. D. 464.) He may give covenants for title. (*Re Ray*, 1896, 1 Ch. 468.)

This section does not provide for the case of a lunatic married woman, who is not entitled either to her separate use by contract, or as a *feme sole* by virtue of the M. W. P. Act, 1882; or for the case of such a married woman having a lunatic husband. It will probably be held that in either case the committee may act on behalf of the lunatic, as in this section prescribed.

If the lunatic has not been so found by inquisition, and a committee appointed, the Court has no jurisdiction under this section to authorize the exercise of the power of sale given by the Settled Land Acts. (*Re Baggs*, 1894, 2 Ch. 416, note; *Re S. S. B.*, 1906, 1 Ch. 712; and see *Re Moleyns and Harris*, 1908, 1 Ch. 110.) But if under s. 116, sub-s. (1), (*d*), of the Lunacy Act, 1890, 53 Vict. c. 5, a person has been appointed to manage settled estates on behalf of a lunatic tenant for life, not so found by inquisition, the Court has jurisdiction, under either s. 120 or s. 128 of the same Act, to authorize such person to exercise a power of sale vested in the tenant for life by the settlement. (*Re X.*, 1894, 2 Ch. 415.) And under s. 120 (*h*) the Court may authorize such person to exercise the power of leasing given to the tenant for life by the Settled Land Acts. (*Re Salt*, 1896, 1 Ch. 117.) But *quære* whether these two cases are now good law. (*Re S. S. B.*, *ubi supra*.)

It appears that, under s. 124 of the Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70, now repealed by the Lunacy Act, 1890, an order could not have been made for the sale of a lunatic's undivided share of land to the owner of the other shares. (See *Re Weld*, 28 Ch. D. 514.) But such an order can be made under the present section. (*Re Gaitskell*, 40 Ch. D. 416; where the Court refused to sanction the particular contract proposed, for want of sufficient information, but gave leave in general terms to sell to the co-owner.)

XV.—Settlement by way of Trusts for Sale.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court Sect. 63 Provision for case of trust

S. L. A. 1882, Sect. 63.

to sell and reinvest in land.

[*The section contains nothing about trusts to reinvest in land.*]

roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

See now S. L. Act, 1884, sects. 6, 7, pp. 343, 344 *et seq.*, *post*. The practical effect of that enactment, taken in connection with the present section, is that absolute trusts for sale can be executed by trustees in the same manner as before the passing of S. L. Act, 1882; but the tenant for life, under the present section, may, if dissatisfied with the action of the trustees, apply to the Court for leave to exercise the statutory powers; after which, if leave should be granted, the powers of the trustees will be suspended, and they will stand only in the position of trustees of the settlement for the purposes of the Act.

In order that land under this section may be settled land, the following conditions must concur. There must be—

S. L. A. 1882, Sect. 63.

(1) A trust or direction for sale;
(2) And for the application of the sale money,
or, of the income of such money,
or, of the income of the land till sale,
or, of any part thereof respectively;
(3) For the benefit of some person or persons for life, or for any other limited period.

It has been held that an express trust for sale is not necessary, in order that land may be subject to a trust for sale within the meaning of this section, and that an implied trust for sale, arising upon a devise on trust to pay debts, is sufficient. (*Re McCurdy's S. E.*, 27 L. R. Ir. 395.) But the trust must be for an immediate sale; therefore, where a trust for sale is followed by a proviso that the property is not to be sold until the expiration of a certain period or the happening of a certain event, there is no "trust or direction for sale" within the meaning of the section. (*Re Horne's S. E.*, 39 Ch. D. 84.) So also where the trust for sale is only to be exercised during the lifetime of the tenant for life upon his request in writing. (*Re Goodall's Settlement, Fane* v. *G.*, 1909, 1 Ch. 440.) But a trust for sale as and when the trustees at their absolute discretion should see fit is within the section. (*Re Crips, Crips* v. *Tod*, 95 L. T. 865.)

If an estate is given in trust for sale, and to maintain infants out of the income, and accumulate the residue for their benefit, they are tenants for life within this section. (*Re Powell, Allaway* v. *Oakley*, W. N. 1884, p. 67.) It is conceived that, in this case, the learned judge must have supposed the gift of the intermediate income to the children to have been vested, not contingent; otherwise, the case would seem to have been overruled by *Re Horne's S. E.*, 39 Ch. D. 84.

The tenant for life for the time being must be ascertained only from the provisions of the instrument under which the trust arises; and if, under its provisions, there is no person for the time being beneficially entitled to the income of the land until sale, there is no tenant for life. The trustees, even before the enactment of the Act of 1884, could have executed such a trust for sale vested in them, without obtaining any consent thereto. (*Re Earle and Webster*, 24 Ch. D. 144.)

The tenant for life under this section, is not the person who will be entitled for life to the income of the proceeds of sale, but the person who is beneficially entitled to the income of the land until sale. If the instrument should make a tenant for life of the income of the proceeds of sale, without disposing of the income of the land until sale, there is, strictly speaking, no tenant for life; but by implication the person entitled to the income of the proceeds of real estate is in such a case taken to be entitled to the income until sale (*Hutcheon* v. *Mannington*, 1 Ves. 366, at p. 367; *Casamajor* v. *Strode*, 19 Ves. note, p. 390; *Re Laing*, L. R. 1 Eq. 416), and may exercise the powers of a tenant for life under the Act. (*Re Searle, Searle* v. *Baker*, 1900, 2 Ch. 829; *Re Darnley, Clifton* v. *Darnley*, 95 L. T. 706.) Even

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if there is no power to postpone, such person is entitled to the whole of the interim rents, though they exceed the income derivable from the proceeds of sale, if there has been no undue delay in selling and no depreciation of the property. (*Hope* v. *d'Hédouville*, 1893, 2 Ch. 361.) And if he executes improvements within the Act before he is let into possession the Court has power under s. 15 of the S. L. Act, 1890, to direct the cost of such improvements to be paid out of capital moneys. (*Re Wormald's S. E., Wormald* v. *Olivant*, W. N. 1908, p. 214.)

Before the coming into operation of S. L. Act, 1884, s. 6, p. 343, *post*, it would seem that the tenant for life of any fraction of the intermediate income might have put a *veto* upon a sale; and, in such cases, there would have been no jurisdiction to order a partition among the claimants of different fractions, there being an existing trust for sale. (*Biggs* v. *Peacock*, 22 Ch. D. 284.)

It would also seem that, during such time as a trust for accumulation extends to the whole income, there is no tenant for life under the present section, there being no person who is "*for the time being* beneficially entitled" to anything. This seems to follow, by parity of reasoning, from *Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423; cited p. 328, *ante*.

A purchaser from trustees, who is aware of the existence of a trust, coming within the present section, must ascertain that no order, giving leave to the tenant for life to exercise the statutory powers, has been registered as a *lis pendens* under S. L. Act, 1884, s. 7, sub-s. (v.), p. 344, *post*, in order that he may obtain the protection afforded by sub-s. (vi.) thereof.

Whenever a purchaser has reason to suspect that he is purchasing from trustees, he should inquire whether there exists any declaration of trust affecting the property. But whether a purchaser, not having notice *aliunde* of a trust, could compel an answer to such inquiry, is doubtful. The mere fact that vendors are joint tenants will not of itself, in the absence of other circumstances, suffice to affect a purchaser with constructive notice of a trust. (See *Re Harman and Uxbridge, &c. Railway*, 24 Ch. D. 720.) But their refusal to enter into covenants for title might perhaps be held to amount to such notice. (See *Boursot* v. *Savage*, L. R. 2 Eq. 134.)

It is conceived that solicitors ought now to place such declarations of trust upon the abstract of title. If it should be held that purchasers can compel an answer to the above-mentioned inquiry, this will become a plain duty.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

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(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

Money paid for equality of partition or exchange is, in effect, applied in the purchase of land; but it is conceived that capital money may be so applied, notwithstanding this sub-section, where the transaction is substantially a partition or exchange, and is not intended to cloak a substantial purchase.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the

S. L. A. 1882 Sect. 63.

same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers o charging.

XVI.—Repeals.

Sect. 64. Repeal of enactments in schedule

64.—(1.) *The enactments described in the schedule to this Act are hereby repealed.*

(2.) *The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.*

This section repeals such part of Lord Cranworth's Act as was not repealed by Conv. Act, 1881; removes certain impediments to the exercise of the powers given by the Improvement of Land Act, 1864, for the purpose of borrowing money for improvements; and repeals the Settled Estates Act, 1877, s. 17, which is superseded by s. 36 of the present Act, p. 293, *ante*. And s. 64 is itself now repealed by the Statute Law Revision Act, 1898.

XVII.—Ireland.

S. L. A. 1882 Sect. 65.

Modifications respecting Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly [, at any time after the passing of this Act, to take effect on or after the commencement of this Act].

40 & 41 Vict. c. 57.

The words in square brackets are repealed by the Statute Law Revision Act, 1898.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act.

40 & 41 Vict. c. 56

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made [at any time after the passing of this Act, to

S. L. A. 1882, Sect. 65.

take effect on or after the commencement of this Act,] in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

The words in square brackets are repealed by the Statute Law Revision Act, 1898.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

The English Court has sanctioned an application of capital money for the improvement of settled estates in Ireland (*Re E. Dunraven's S. E.*, 1907, 2 Ch. 417) and in Scotland. (*Re Gurney's Settmt., Sullivan* v. *Gurney*, 1907, 2 Ch. 496.)

Section 64.

THE SCHEDULE.

Repeals.

23 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills.....	in part; namely,— Parts I. and IV. (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114. in part.	The Improvement of Land Act, 1864.	in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or " (inclusive); and from "or if the landowner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.
40 & 41 Vict. c. 18. in part.	The Settled Estates Act, 1877	in part; namely,— Section seventeen.

The Schedule is now repealed by the Statute Law Revision Act, 1898.

THE SETTLED LAND ACT, 1884.

(47 & 48 Vict. c. 18.)

An Act to amend the Settled Land Act, 1882.

[3rd July, 1884.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Sect. 1. Short title.

1. This Act may be cited as the Settled Land Act, 1884.

Sect. 2. Interpretation.

2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882.

Sect. 3. Construction of Act.

3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

Sect. 4. Fine on a lease to be capital money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

As to fines, see note on S. L. Act, 1882, s. 7, sub-s. (2), p. 232, *ante*.

Sect. 5. Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

See note on S. L. Act, 1882, s. 45, p. 305, *ante*.

S. L. A. 1884, Sect. 5.

As to leases not exceeding twenty-one years, see S. L. Act, 1890, s. 7, p. 354, *post*.

There seems to be nothing to render necessary a renewal of the notice, upon the death of any, or all, of the trustees to whom the original notice was given. But since notice to trustees is in general a personal notice only (see *Hallows* v. *Lloyd*, 39 Ch. D. 686), it would be more proper, and more safe, for the tenant for life to renew the notice upon every appointment of a new trustee; and all persons dealing with the tenant for life ought still, as formerly, to ascertain the existence of trustees for the purposes of the Act, in all cases in which notice to them is requisite; though they are not concerned, if dealing in good faith, to ascertain that the notice has in fact been given.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

It does not appear what would be the consequence if the tenant for life should neglect or refuse to answer the trustee's questions. There seems to be no jurisdiction in the Court to order him to answer interrogatories upon oath; and, apparently, the only remedy would be the somewhat violent one of restraining him by injunction from exercising any of his statutory powers.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

The notice may be waived by trustee, even after a final contract has been entered into by a tenant for life; and even though the trustee has not been appointed until after the execution of the contract. (*Hatten* v. *Russell*, 38 Ch. D. 334.) If the reasoning of Kay, J., in that case may be relied upon, a purchaser is not concerned to inquire, whether there are any trustees at the date of the contract, but only, whether there are any at the date of the conveyance.

It does not appear that even all the trustees together have any authority to waive the notice directed by s. 45, sub-s. (1), of S. L. Act, 1882, p. 305, *ante*, to be given to the "solicitor for the trustees." This conclusion could be arrived at only by giving to the word "notice," in the present sub-section, a meaning which would enable a single trustee to waive the giving of notice to all the trustees. Moreover, the notice to the solicitor seems to have been intended rather for the

protection of the inheritance than for the information of the trustees. S. L. A. 1884, Sect. 5.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

Sect. 6. As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

This sub-section practically confirms, and extends to all settlements made by way of trust for sale, the doctrine laid down by Pearson, J., in *Taylor* v. *Poncia*, 25 Ch. D. 646; namely, that an absolute trust for sale may be exercised without the consent of the statutory tenant for life. Since in that case the sale was conducted under an order of the Court, which had been made in exercise of a jurisdiction which in no way depended upon s. 63 of S. L. Act, 1882, there could be no doubt about the power of the Court to supersede all questions relating to consents which might be necessary to sales made under that section. The above-stated rule was, therefore, not strictly material to the decision in that case. In *Taylor* v. *Poncia*, the trust in question was an absolute trust. This sub-section applies also to discretionary trusts and powers, provided that they are annexed to a trust for sale.

See also the first note on s. 7, *post*.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise

S. L. A. 1884, Sect. 6.

by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

Where a power of sale was given to trustees of the whole estate, but undivided shares were separately settled, it was held that the tenants for life of the undivided shares did not together constitute a tenant for life for the purposes of the Act within the meaning of this sub-section. (*Re Osborne and Bright's, Ltd.*, 1902, 1 Ch. 335.)

In the case of ordinary settlements, where the tenant for life happens to consist of more than one person, powers given to trustees can be exercised more easily under this sub-section than under the provisions of S. L. Act, 1882.

A question may, perhaps, arise as to the proper form of the covenants for title in conveyances made under this sub-section, where only one out of several tenants for life has consented. It is the practice for tenants for life, whether legal or equitable, whose consent is necessary to a sale, to covenant for title; as to which, see *Re London Bridge Act*, 13 Sim. 176; *Earl Poulett* v. *Hood*, L. R. 5 Eq. 115; *Re Sawyer and Baring*, W. N. 1884, p. 192; 33 W. R. 26.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

Sect. 7. Powers given by s. 63 to be exercised only with leave of the Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

The effect of this section in conjunction with s. 6, sub-s. (1), *supra*, is to remove several objections to the practical working of s. 63 of the Act of 1882, p. 334, *ante*.

(1.) A sale can now be effected under a trust for sale, without putting the trusts of the purchase-money upon the title to the lands.

(2.) In cases where the statutory tenant for life has obtained an order authorizing him to exercise the statutory powers, the order alone is put upon the title. The effect of sub-s. (ix.), *infra*, seems to be to make the order conclusive evidence as to his title to exercise the powers.

(i.) Those powers are not to be exercised without the leave of the Court.

By reason of this restriction, it appears to have been held in Ireland, in a case where a tenant, holding under a lease granted

by a tenant for life under a settlement of this kind, which lease was in excess of the statutory power, took proceedings, against the wish of the trustees, but with the assent of the tenant for life, for the redemption of his holding under the Redemption of Rent (Ireland) Act, 1891: that the defect in the lease could not be cured by a sale made by the tenant for life under the statutory powers. (*Gyles and Beausang*, 1895, 2 I. R. 325.)

(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

It would appear that leave can be given only to the person or persons who, under s. 63 of S. L. Act, 1882, could have exercised the powers as tenant for life. This present section does not deal with the statutory powers in general, but only with the powers conferred by s. 63 of the former Act. It does not clearly appear whether leave could be given to one, or less than the whole, of the persons constituting such tenant for life, when they are more than one. The language of sub-s. (vii.), *infra*, would suggest that leave can be given only to the whole.

It is clear, from sub-s. (vii.), *infra*, that no order can be made, except upon the application of all the persons constituting the tenant for life; though, by sub-s. (viii.), when an order has once been made, it may be varied or rescinded upon the application of any person interested. Such applications might become necessary, if one of two tenants in common, having leave to exercise the powers, should become lunatic; or if it is found that the statutory powers are being improperly exercised.

For remarks upon the principles by which the Court is guided in granting leave, see *Re Harding's Estate*, 1891, 1 Ch. 60; *Re Bagot's Settmt., Bagot* v. *Kittoe*, 1894, 1 Ch. 177. The Court will not grant leave to make a building lease partly in consideration of improvements and repairs of a trivial nature, such as might reasonably be executed by a tenant for life at his own expense. (*Re Daniell's S. E.*, 1894, 3 Ch. 503.)

If a sale under the Irish Land Acts, 1903 and 1904, is otherwise proper, the consent of the Court will not be refused merely because the bonus payable under s. 48 of the Irish Land Act, 1903, becomes the absolute property of the tenant for life. (*Re Iever's S. E.*, 1904, 1 I. R. 492.) But the tenant for life is not entitled to such an order as a matter of course. The Court must be satisfied that the proposed sale is for the benefit of all parties interested under the settlement. (*Re Tuthill*, 1907, 1 I. R. 305.)

(iii.) The Court may from time to time rescind, or vary, any order made under this

S. L. A. 1884. Sect. 7.

section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

After any such order has been made, but before its registration as a *lis pendens*, any exercise by the trustees of any power affected by the order seems to be improper but not invalid; see sub-s. (vi.), *infra*.

It is submitted that such order ought to be expressed to be subject to any contract previously made by the trustees, which is known to exist. It is, however, conceived that, if any such contract should be passed over in silence, the order would not prevent it from being carried into effect.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

A purchaser, &c., dealing with a person having leave to exercise the powers, should require the order to be duly registered, before completion of the transaction, if this has not already been done.

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

This implies that registration under this section shall be notice to all the world of the contents of the order; but that, so long as no order is registered, all persons may safely deal with the trustees for sale. On the registration of *lis pendens*, see 2 & 3 Vict. c. 11, s. 7; and on satisfaction or vacation thereof, 23 & 24 Vict. c. 115, s. 2; 30 & 31 Vict. c. 47, s. 2. The doctrine of *lis pendens* does not, properly speaking, depend upon notice,

but upon the nature of judgments and decrees; and registration gave them no greater validity than they had before, but only imposed restrictions or conditions, subject to which they might have effect. The doctrine applies only to actions relating to land. (*Wigram* v. *Buckley*, 1894, 3 Ch. 483.)

(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

It is conceived that the effect of this sub-section is only to relieve persons dealing with a tenant for life, who has obtained an order, from inquiring into his title, not to authorize the Court to give leave to any person other than the person or persons specified in s. 63 of S. L. Act, 1882, p. 334, *ante*, to exercise the statutory powers. That is to say, the adjudication of the Court upon his title under the settlement is conclusive, in this respect, and the Court is bound to adjudicate upon such title.

(x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

Sect. 8.

Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

The "title of proceedings" given in Form I. in the Appendix

S. L. A. 1884, Sect. 8.

to the Settled Land Act Rules, 1882, at p. 546, *post*, may be adapted to cases arising under this section, as follows :—

In the Matter of certain lands known as , situate at , in the county of , being a settled estate within the meaning of the Settled Land Act, 1884, s. 8, by reason of the death, on the day of , 18 , of A. B., late the wife of C. D., of , leaving the said C. D. tenant by the curtesy of the said lands.

And in the Matter of the Settled Land Acts, 1882 to 1890.

This section removes certain difficulties arising on s. 58, sub-s. (1), (viii.), of S. L. Act, 1882, at p. 327, *ante*. Under the latter section, since tenancy by the curtesy arises by the common law or special custom, there is, strictly speaking, no "instrument" within the meaning of s. 58, sub-s. (2) of the same Act. (See *Re Pocock and Prankerd's Contract*, 1896, 1 Ch. p. 306.) Some ambiguity seems to remain, by reason of the omission to state either (1) the time at which the settlement shall be deemed to have been made by the wife; or (2) what estate or estates shall be deemed to be comprised in it.

(1) The estate of tenant by the curtesy does not, for all purposes, commence with the death of the wife, but, for some purposes, with the birth of issue inheritable, after which event the husband alone was entitled to the homage of the tenants of his wife's manor. (Co. Litt. 67 a.) Lord Coke also cites the decision in 29 Edw. 3, that a tenant by the curtesy, cannot claim by devise, and waive his tenancy by the curtesy, "because saith the booke, *the freehold commenced in him before the devise* for terme of his life." (Co. Litt. 30 a.) It is probable that, for the purposes of the present enactment, the tenancy will be held to commence at the wife's death, and that the settlement will be deemed to have been then made.

(2) The only estate which is, by the enactment, expressed to be comprised in the supposed settlement, is the estate of the tenant by the curtesy himself. It will probably be held that assurances made by the tenant by the curtesy, in exercise of the statutory powers, may extend over such estate as descends from the wife to her heir. This seems to have been assumed in *Mogridge* v. *Clapp*, 1892, 3 Ch. 382.

THE

SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

(50 & 51 Vict. c. 30.)

An Act to amend the Settled Land Act (1882).

[23rd August, 1887.]

Whereas by the twenty-first section of the Settled Land Act, 1882 (in this Act referred to as the Act of 1882), it is provided that capital money arising under that Act may be applied in payment for any improvement by that Act authorized: 45 & 46 Vict. c. 38.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Amendment of s. 21 of the Settled Land Act, 1882.

1. Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882.

See also S. L. Act, 1890, s. 15, p. 362, *post*.

S. L. A. 1887, Sect. 1.

It has been held that, in applying capital money in discharge of periodical payments charged upon land under a drainage scheme, the whole amount of each periodical payment cannot be discharged out of capital, but that an apportionment must be made to ascertain what part of each such payment is attributable to interest and what part to capital, and that only the latter can be paid out of capital money. (*Re Ld. Sudeley's S. E.*, 37 Ch. D. 123.) But it is to be noted that in this case the tenant for life practically waived his right, if any, to payment of the whole of the instalments out of capital; and the decision was disapproved by the C. A. in *Re Ld. Egmont's S. E.*, 45 Ch. D. 395. The last-mentioned case also decided that capital moneys might be applied in redeeming such terminable rentcharges, and that a reasonable bonus might be paid as an inducement to consent to the redemption. But money paid by a tenant for life merely for the purpose of obtaining a reduction of the interest cannot be repaid out of capital money. (*Re Verney's S. E.*, 1898, 1 Ch. 508.)

The tenant for life cannot claim to be reimbursed for past payments made by him. (*Re Howard's S. E.*, 1892, 2 Ch. 233 *Re Dalison's S. E.*, 1892, 3 Ch. 522.)

Future instalments may be provided for, although a part of the lands has been sold. (*Re Howard's S. E., supra.*)

This section applies only to improvements within the meaning of S. L. Act, 1882, s. 25. (*Re Newton's S. E.*, W. N. 1890, p. 24.)

It would seem that an order cannot be made under this section directing the application of capital moneys not yet accrued. (*Re Marq. of Bristol's S. E.*, 1893, 3 Ch. 161.)

Sect. 2. Sect. 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

See S. L. Act, 1882, s. 28, p. 277, *ante*.

Sect. 3. Short title.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

THE SETTLED LAND ACT, 1889.

(52 & 53 Vict. c. 36.)

An Act to amend the Settled Land Act, 1882.

[12th August, 1889.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Construction and short title.

1. This Act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Sect. 2. Option of purchase in building lease. 45 & 46 Vict. c. 38.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement.

Sect. 3. Price to be capital money

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

See S. L. Act, 1882, s. 8, and notes thereon, p. 234, *ante*.

THE SETTLED LAND ACT, 1890.

(53 & 54 Vict. c. 69.)

An Act to amend the Settled Land Acts, 1882 *to* 1889.
[18th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

Sect. 1. Short title.

1. This Act may be cited as the Settled Land Act, 1890.

Sect. 2. Acts to be construed together.

2. The Settled Land Acts, 1882 to 1889, and this Act are to be read and construed together as one Act, and may be cited as the Settled Land Acts, 1882 to 1890.

Sect. 3. Interpretation.

3. Expressions used in this Act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

Definitions.

Sect. 4. Instrument in consideration of marriage, &c. to be part of the settlement.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an

instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

S. L. A. 1890, Sect. 4.

45 & 46 Vict. c. 38.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition.

See S. L. Act, 1882, s. 20, and notes thereon, p. 251, *ante*.

The claims of a person having such a charge cannot be investigated upon a summons taken out under S. L. Act, 1882. (*Re Ailesbury S. E.*, W. N. 1893, p. 140; 42 W. R. 45.)

It was held by North, J., in *Re Tibbit's S. E.*, 1897, 2 Ch. 149, relying upon *Re Meade's S. E.*, 1897, 1 I. R. 121, that, inasmuch as the instruments referred to in s. 4 are to be reckoned among the instruments creating the settlement, therefore it is necessary, when trustees of the settlement for purposes of the Acts are appointed by the Court, that the appointment shall be expressed to extend to these instruments. But this does not preclude the tenant for life under the settlement from selling without having obtained the concurrence of the trustees of these instruments. (*Re Keck and Hart's Contract*, 1898, 1 Ch. 617.) Sect. 4 is not to be read as providing that an assignment made by a tenant for life in consideration of marriage or by way of family arrangement is to be deemed one of the instruments creating the settlement for all the purposes of the Act; it is limited to the purpose of excluding the operation of s. 50 of the Act of 1882 altogether. (*Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96; approved in *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275.) The correctness of the decision in *Re Tibbit's S. E.* must therefore be doubted. (See *ante*, p. 212.)

A jointure deed executed by a tenant for life under a power does not create a charge on his estate under s. 4. (*Re Keck and Hart's Contract*, 1898, 1 Ch. 617; *Re Hayes' S. E.*, 1907, 1 I. R. 88.)

Exchanges.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

Sect. 5, Creation of easements on exchange or partition.

The words "on an exchange or partition" do not govern the whole section, and the section authorizes an exchange of easements apart from any exchange or partition of land. (*Re*

S. L. A. 1890, Sect. 5.

Bracken's Settlement, 1903, 1 Ch. 265.) *Quære*, whether it authorizes an exchange of release of easements between two settled estates. (*Re Brotherton's Estate*, W. N. 1907, p. 230; 1908, p. 56.) But such an arrangement can be carried out by cross sales of the easements. (*S. C.*)

Completion of Contracts.

Sect. 6. Power to complete predecessor's contract.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

See S. L. Act, 1882, s. 31, p. 282, *ante*.

Leases.

Sect. 7. Provision as to leases for twenty-one years.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life—

(i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and

45 & 46 Vict. c. 38.

See p. 305, *ante*.

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

Sect. 8. Provision as to mining leases

8. In a mining lease—

(i.) The rent may be made to vary according to the price of the minerals or substances gotten or any of them:

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner pre-

scribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

S. L. A. 1890, Sect. 8.

See S. L. Act, 1882, s. 9, p. 235, *ante*

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rentcharge, the reservation shall operate to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rentcharge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

Sect. 9. Power to reserve a rent charge on a grant in fee simple.

44 & 45 Vict. c. 41. [*See p.* 131, *ante, and note on sub-s.* (4).]

Mansion and Park.

10.—(1.) From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

Sect. 10. Restriction on sale of mansion.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

[*This replaces S. L. Act*, 1882, *s.* 15.]

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

The word "park" is not confined to an ancient legal park, but includes an ordinary private park. (*Pease* v. *Courtney*, 1904,

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2 Ch. 503.) The section applies to a park not usually occupied with the mansion house, the words "usually occupied therewith" referring merely to the words "lands (if any)" immediately preceding them. (*S. C.*)

The repealed section did not extend to exchanges.

In sub-s. (2) the phrase, "trustees of the settlement," seems to mean, trustees for purposes of S. L. Act, 1882.

The phrase "on any settled land," seems to imply, that where the settlement comprises more than one property, each separate property may have a principal mansion house of its own. It could hardly be said that a principal mansion house in Devonshire is "on any settled land" in Durham.

Any apartment held under a separate tenancy, in which the tenant resides, is, in law, a mansion house; as, for example, a chamber in an Inn of Court. (Kel. 27; *Evans and Fynche's Case*, Cro. Car. 473.) But it is obvious from sub-s. (3) that such a chamber is not a principal mansion house within the section, and it may be doubted whether any town house, whatever its size or importance, with less than twenty-five acres occupied therewith, is a principal mansion house within the section.

The present enactment endeavours to introduce some reasonable degree of restriction into the law relating to the subject with which it treats. As to what might be a mansion house within the meaning of the Settled Estates Act, 1877, see *Re Spurway's S. E.*, 10 Ch. D. at p. 233. There may be two principal mansion houses on the same settled land. (*Gilbey* v. *Rush*, 1906, 1 Ch. 11.)

The question whether a building is a principal mansion house within the meaning of the section must be answered with reference to the state of things existing at the time when the tenant for life wishes to sell, and not at the date of the settlement. (*Re Wythe's S. E.*, 1908, 1 Ch. 593.)

As this section has evidently been enacted in the interest of the remaindermen, it seems reasonable to conclude that, in cases where a sale or leasing of the principal mansion house, &c., can reasonably be regarded by the remaindermen as a serious grievance, the Court will hesitate to consent thereto. Such grievance might reasonably be founded only upon sentiment, provided that the sentiment be such as commonly has practical weight in the affairs of life. In many cases, the grievance would rest upon a more substantial ground, such as the loss of caste and position likely to follow upon the alienation of an old family mansion. For some remarks upon the principles by which the Court is guided, see *Marquis Camden* v. *Murray*, "The Times," 19th July, 1883. "The Times" report of the judgment in this case is printed in App. II., *post*. A previous attempt had unsuccessfully been made to obtain an order for sale in an administration action. See *S. C.*, 16 Ch. D. 161. See also *Bruce* v. *Marquis of Ailesbury*, 1892, A. C. 356: deciding that the interests of the tenants and persons in occupation of the land should be considered as well as the

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interests of the persons entitled under the settlement. In *Re Wortham's S. E.*, 75 L. T. 293, the Court gave leave, on the grounds (1) that the estate was not an old family estate, and (2) that the settlor had directed a sale on the death of the tenant for life.

A lease which purports to grant an easement over the park occupied with the principal mansion house is void. (*Dowager Duch. of Sutherland* v. *Duke of S.*, 1893, 3 Ch. 169; *Pease* v. *Courtney*, 1904, 2 Ch. 503.)

The general rule, that a respondent to an appeal cannot be heard by counsel in support of the appeal, may be relaxed in favour of a respondent trustee who supports an appeal by the tenant for life from an order made under this section. (*Re Marq. of Ailesbury's S. E.*, 1892, 1 Ch. at p. 526.)

The intention of the section must be to enable the tenant for life to appeal to the Court from a refusal by the trustees, or where they decline the responsibility. The power to apply to the Court cannot have been intended to be given only when there are no trustees, because in such a case trustees must be appointed for the purpose of receiving notice, under S. L. Act, 1882, s. 45, p. 305, *ante*, and the subsequent enactments there mentioned. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.) But the tenant for life does not seem to be bound to apply to the trustees before applying to the Court.

The consent of the trustees must be given at the time and with reference to the particular transaction, but it need not be in writing or communicated to either the tenant for life or the purchaser from him. (*Gilbey* v. *Rush*, 1906, 1 Ch. 11.) If the trustees assent to the transaction, their consent is effectually given, notwithstanding that they may have done so in the belief that the house in question was not the principal mansion house. (*Ibid.*)

When a will creating a settlement contains express provisions against a sale of the mansion house by the trustees, the Court is not hindered from consenting to a sale; but if personal chattels are settled to devolve with the mansion house, the Court will require, before consenting to a sale of the house, that some arrangement shall be made respecting the chattels. (*Re Brown's Will*, 27 Ch. D. 179.)

No condition as to residence will prevent the operation of this section, see note on s. 51 of S. L. A. 1882, at p. 315, *ante*, and *Re Paget's S. E.*, 30 Ch. D. 161, there cited; though, of course, the condition must be performed so long as the house remains unsold. (*Re Haynes, Kemp* v. *Haynes*, 37 Ch. D. 306.)

Where the tenant for life has mortgaged his life interest to its full value, the Court will not, in its discretion under this section, consent to a sale on his application, without full information as to the proposed sale and the consent of the mortgagees. (*Re Sebright's S. E.*, 33 Ch. D. 429.)

The same principles apply to the exercise of the statutory power of leasing. (*Re Thompson's Will*, 21 L. R. Ir. 109.)

Fixed iron cases, containing moveable specimens, in a private

S. L. A. 1890, Sect. 10.

museum forming part of the mansion house, are fixtures, but the specimens are not. (*Visct. Hill* v. *Bullock*, 1897, 2 Ch. 482.)

Where a tenant for life agreed to let a park without the consent of the trustees, and the lessee entered and was ejected by the remainderman after the death of the tenant for life, it was held that the lessee was not entitled to damages against the estate of the tenant for life. (*Pease* v. *Courtney*, 1904, 2 Ch. 503.)

As to the service of notices in applications under this section, see the S. L. Act Rules, 1882, r. 4, p. 543, *post*. See, also, for provisions as to form of the lease, *ibid*. r. 9.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms IV., V., VI., VII., *post*.

The Raising of Money.

Sect. 11. Power to raise money by mortgage.

11.—(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

Before the enactment of this section, money could be raised by mortgage only under S. L. Act, 1882, s. 18, p. 247, *ante*, for the purpose of enfranchisement, exchange, or partition; or under S. L. Act, 1882, s. 47, p. 309, *ante*, by order of the Court, for payment of costs, charges or expenses.

Money is "required" within the meaning of the section whenever it is reasonably required having regard to the circumstances of the settled land, and not merely in cases where the mortgagee has given notice to call in his money. (*Re Clifford, Scott* v. *Clifford*, 1902, 1 Ch. 87.)

A tenant for life is not justified in endeavouring to keep in the family a heavily incumbered estate, by mortgaging it under this section, if he thereby sacrifices the interests of the existing incumbrancers, and the Court may restrain him by injunction.

(*Hampden* v. *E. of Buckinghamshire*, 1893, 2 Ch. 531.) But this is the furthest that the Court has gone in controlling the discretion of the tenant for life. (*Re Richardson, R.* v. *R.*, 1900, 2 Ch. 778, 790.) S. L. A. 1890, Sect. 11.

One part of the settled land may, under this section, be mortgaged to pay off incumbrances affecting only another part. (1893, 2 Ch. 531.) And this will apply even though such other part has been brought into settlement at a later date, subject to the incumbrance which it is desired to pay off. (*Re Ld. Monson's S. E.*, 1898, 1 Ch. 427; and see *Re Coull's S. E.*, 1905, 1 Ch. 712.)

The expenses of making up a street under the Public Health Act, which have been paid by the tenant for life out of his own pocket, are an incumbrance within the meaning of the section. (*Re Smith's S. E.*, 1901, 1 Ch. 689.) And so are the expenses of paving a street under the Private Streets Works Act, 1892, although that Act gives limited owners a power to raise money to be repaid by instalments in twenty years. (*Re Pizzi, Scrivener* v. *Aldridge*, 1907, 1 Ch. 67.)

Dealings as between Tenant for Life and the Estate.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction. Sect. 12. Provision enabling dealings with tenant for life.

It would seem that the trustees are the proper persons to execute any conveyance to the tenant for life.

Application of Capital Money.

13. Improvements authorized by the Act of 1882 shall include the following; namely, Sect. 13. Application of capital money.

(i.) Bridges;

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.

There must be either an immediate intention of letting (*Re De Teissier's S. E.*, 1893, 1 Ch. 153; approved, *Re Ld. Gerard's*

S. L. A. 1890, Sect. 13.

S. E., 1893, 3 Ch. 252; *Stanford* v. *Roberts*, 1901, 1 Ch. 440), or a notice by the tenant to quit unless the additions are made. (*Re Calverley's S. E.*, 1904, 1 Ch. 150.)

The erection of a new building in the place of an old one is not an addition or alteration within the section. (*Re Leveson Gower's S. E.*, 1905, 2 Ch. 95.)

The word "additions" means structural additions, and does not include an electric light installation for the improvement of the mansion house. (*Re Clarke's Settlement*, 1902, 2 Ch. 327; *Re Blagrave's S. E.*, 1903, 1 Ch. 560.) *Re Freake's Settlement*, *Kinnaird* v. *Freake*, 1902, 1 Ch. 97, must be considered as overruled. Nor does it include an alteration in the shafting for a mill. (*Re Harrington's S. E.*, 94 L. T. 623.)

"Reasonably necessary or proper" means something which, though not absolutely necessary, a reasonable and prudent owner of property would do to make his house habitable, *e.g.*, putting in a new floor on concrete to keep out dry rot. (*Stanford* v. *Roberts*, 1901, 1 Ch. 440.)

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

See S. L. Act, 1882, s. 25, p. 268, *ante*.

"Annual rental" includes the income of invested capital moneys. (*Re De Teissier's S. E.*, 1893, 1 Ch. 153.) And it seems to include the total rental of the settled estate, not only that of the particular estate upon which the mansion house stands. (*Re Ld. Gerard's S. E.*, 1893, 3 Ch. 252.) But it does not include an estimated rent for the mansion house and park occupied by the tenant for life. (*Re Walker's S. E.*, 1894, 1 Ch. 189.) Nor ought the cost of repairs to be taken into consideration in estimating the annual rental. (*Re Kensington S. E.*, 21 Times L. R. 351.)

Inserting warming apparatus is not within sub-s. (ii.), but replacing roof is. (*Re Gaskell's S.E.*, 1894, 1 Ch. 485, approved *Re Blagrave's S. E.*, 1903, 1 Ch. 560.) A new system of drainage and a bath and hot water supply have been considered additions within the sub-section. (*Standing* v. *Gray*, 1903, 1 I. R. 49.)

Rebuilding old stables, merely because they were ugly and

S. L. A. 1890, Sect. 13.

inconvenient, is not authorized. (*Re Ld. Gerard's S. E.*, 1893, 3 Ch. 252.) Nor is the erection of a new laundry 250 yards away from the mansion house. (*Re Earl Dunraven's S. E.*, 1907, 2 Ch. 417.)

Mere repairs and improvements will not amount to a rebuilding within sub-s. (iv.). (*Re De Teissier's S. E., supra; Re Ld. de Tabley, Leighton* v. *L.*, W. N. 1896, p. 162; *Re Wright's S. E.*, 83 L. T. 159; *Re Willis*, 1902, 1 Ch. 15.) But alteration, reconstruction, and enlargement of a considerable part of the mansion house, may amount to such rebuilding. (*Re Walker's S. E., supra.*) It is a question of fact in each case. (*Re Kensington S. E.*, 21 Times L. R. 351; *Re Dunham Massey's S. E.*, 22 Times L. R. 595.) A partial rebuilding necessary to get rid of dry rot will be allowed (*Re Legh's S. E.*, 1902, 2 Ch. 274), but only to the extent of one half of the annual rental of the whole estate, and the balance will not be allowed by way of salvage under the general jurisdiction of the Court. (*Ibid.*) Apart from the S. L. Acts, the general jurisdiction of the Court can authorize no expenditure out of capital for repairs, except such as are absolutely necessary by way of salvage, and which cannot possibly be otherwise provided for. (*Re Ld. de Tabley, supra.*) But the Acts have not lessened the Court's original jurisdiction; and, acting on the principle above stated, the Court, on behalf of an infant tenant in tail in possession, with the concurrence of the next remainderman, has authorized the trustees to expend capital on repairs which were necessary in order that the property might continue to be let. (*Re Hawker's S. E.*, 66 L. J. Ch. 341.)

The cost of works which are not permanent improvements likely to benefit the remainderman more than the tenant for life, but are mere repairs or works incidental to the ordinary use, occupation, and enjoyment of the property (*e.g.*, alteration in the sanitary arrangements of a mansion house), will not be allowed out of capital moneys. (*Re Tucker's S. E.*, 1895, 2 Ch. 468.) But the Court will have regard to the nature of the work, and in every case the question must depend on the circumstances. (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 319, 324, where the cost of reconstructing drainage was allowed out of capital moneys.) Works that a reasonable and prudent owner, if absolutely entitled, would do to make the house habitable are alterations within the section. (*Stanford* v. *Roberts*, 1901, 1 Ch. 440.)

Sect. 14. Capital money in Court may be paid out to trustees.

14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

See S. L. Act, 1882, s. 22, and notes thereon, p. 263, *ante*.

S. L. A. 1890, Sect. 15.

Court may order payment for improvements executed.

15. The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court.

See S. L. Act, 1882, s. 21, sub-s. (iii.), p. 256, *ante*; *ibid.* s. 25, p. 268, *ante*; S. L. Act, 1887, s. 1, p. 349, *ante*.

Capital moneys cannot under this section be applied in repaying to the tenant for life instalments which he had paid before requiring provision for the redemption of an improvement rent-charge to be made under S. L. Act, 1887. (*Re Dalison's S. E.*, 1892, 3 Ch. 522; see also *Re Ormrod's S. E.*, 1892, 2 Ch. 318.)

An order will not be made that future capital moneys may be applied as and when they may accrue. (*Re Marq. of Bristol's S. E.*, 1893, 3 Ch. 161.)

A tenant for life who, instead of resorting to the Act, uses a sinking fund arising under the provisions of the settlement for making improvements, is bound to continue to make towards the sinking fund payments prescribed by the settlement. (*Re Sudbury &c. Estates, Vernon* v. *V.*, 1893, 3 Ch. 74.)

The Court may decline to exercise its discretion in favour of the tenant for life, where the settlor has created a special fund for repairs and improvements. (*Cardigan* v. *Curzon-Howe*, 9 Times L. R. 244; *Re Partington, Reigh* v. *Kane*, 1902, 1 Ch. 711.)

The Court has jurisdiction to authorize reimbursement of past payments; but in a case where the tenant for life submitted no scheme, his claim will be closely scrutinized. (*Re Tucker's S. E.*, 1895, 2 Ch. 468.) Delay is a ground for refusal in such a case. (*Re Allen's S. E.*, 126 L. T. Newsp. 282.)

Costs of sanitary works executed under the Public Health (London) Act, 1891, upon settled leaseholds, are payable by the trustees out of corpus. (*Re Lever, Cordwell* v. *Lever*, 1897, 1 Ch. 32.) But it is competent for the Court to decide according to the circumstances of each particular case how the cost shall be borne as between the tenant for life and remainderman. (*Re Farnham's Settlement, Law Union and Crown Assurance Co.* v. *Hartopp*, 1904, 2 Ch. 561.)

The Court will, under this section, allow expenditure in improvements to be recouped out of capital moneys where such expenditure has been incurred by the trustees (*Re Thomas, Weatherall* v. *Thomas*, 1900, 1 Ch. 319, 324), or by the tenant for life with the knowledge of the trustees. (*Re E. of Lisburne's S. E.*, W. N. 1901, p. 91.)

It will also direct capital money to be applied in payment of

improvements unauthorized by the Act, but authorized by a special clause in the settlement. (*Re Egmont's S. E., Egmont* v. *Lefroy*, 44 Sol. Jo. 428.)

A deviation from the scheme approved by the trustees may be sanctioned under this section. (*Re Earl of Egmont's S. E.* W. N. 1908, p. 176.)

Where land is held upon trust for sale and the person entitled to the income is only tenant for life by virtue of s. 63 of the S. L. Act, 1882, the Court has power under this section to direct capital moneys to be applied in paying for improvements executed by such tenant for life before he was let into possession and receipt of the rents and profits. (*Re Wormald's S. E., Wormald* v. *Ollivant*, W. N. 1908, p. 214.)

Trustees.

Sect. 16.
Trustees for the purposes of the Act.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

See S. L. Act, 1882, s. 2, sub-s. (8), and note thereon, p. 218, *ante*. Lands purchased by the trustees out of money bequeathed to them for the purpose which are to be held upon the same trusts as the settled lands are "lands comprised in the settlement," and the trustees are trustees for the purposes of the Act. (*Re Moore*, 1906, 1 Ch. 789.)

S. L. A. 1890, Sect. 17.

Application of provisions of 44 & 45 Vict. c. 41, as to appointment of trustees.

17.—(1.) *All the powers and provisions contained in the Conveyancing and Law of Property Act*, 1881, *with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts*, 1882 *to* 1890, *whether appointed by the Court or by the settlement, or under provisions contained in the settlement.*

(2.) *This section applies and is to have effect with respect to an appointment or any discharge and retirement of trustees taking place before as well as after the passing of this Act.*

(3.) *This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act otherwise than under the provisions of the Conveyancing and Law of Property Act*, 1881.

This section is repealed by the Trustee Act, 1893; and is replaced by s. 47 of that Act, p. 429, *post*.

Sect. 18.

Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

18. The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum.

See S. L. Act, 1882, s. 25, sub-s. (x.), and note thereon, p. 270, *ante*.

Sect. 19.

Power to vacate registration of writ.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof.

THE TRUSTEE ACT, 1888.

(51 & 52 Vict. c. 59.)

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees.

[24th December, 1888.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

Sect. 1.
Short title, extent, and definition.

1.—(1.) This Act may be cited as the Trustee Act, 1888.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

"The words 'express trust' in the statute [3 & 4 Will. 4, c. 27] are used by way of opposition to trusts arising by implication, trusts resulting or trusts by operation of law." (Westbury, L.C., in *Dickenson* v. *Teasdale*, 1 De G. J. & S. at p. 59.)

A trustee *de son tort* seems to be in the same position, under 3 & 4 Will. 4, c. 27, as a trustee under an express trust. (*Soar* v. *Ashwell*, 1893, 2 Q. B. 390.) In that case s. 8 of the present Act did not apply, because the action had been commenced within the six years.

But with regard to some of the Act's provisions, such as sects. 4 and 5, it would seem to be not unreasonable that, when holding a trustee *de son tort* liable, the Court should take into account the extent of what would have been his liability if he had been a lawful trustee, and should affect him only with the same measure of liability. The same remark would not apply to provisions for the indemnity of trustees who employ agents.

Trustee Act, 1888, Sect. 1.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Sect. 2. *Receipt of money by solicitor as agent.*

2.—(1.) *It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the Conveyancing and Law of Property Act*, 1881; *and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee.*

44 & 45 *Vict. c.* 41.

(2.) *It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by such trustee, and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the banker or solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such banker or solicitor to pay the same to the trustee.*

(3.) *This section shall apply only where the money or valuable consideration or property is to be received after the passing of this Act.*

Trustee Act, 1888. Sect. 2.

This section was repealed by the Trustee Act, 1893; and s. 17 of that Act is substituted for it. See p. 399, *post*.

3.—(1.) *No sale made by a trustee shall be impeached by any cestui que trust upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate.*

Sect. 3. *Depreciatory conditions on sales by trustees.*

(2.) *No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall appear that such purchaser was acting in collusion with such trustee at the time when the contract for such sale was made.*

(3.) *No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.*

(4.) *This section shall apply only to sales made after the passing of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 14 of that Act is substituted for it. See p. 398, *post*.

4.—(1.) *No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the*

Sect. 4. *Loans by trustees.*

Trustee Act, 1888, Sect. 4.

loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend.

(2.) *No trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title.*

This provision has commonly been inserted in investment clauses which authorize the investment of trust money upon leaseholds.

(3.) *No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.*

(4.) *This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 8 of that Act is substituted for it. See p. 383, *post*.

Sect. 5. *Liability for loss by reason of improper investments.*

5.—(1.) *Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.*

(2.) *This section shall apply to investments made as well before as after the passing of this Act, except where*

some action or other proceeding shall be pending with reference thereto at the passing of this Act.

Trustee Act, 1888. Sect. 5.

This section was repealed by the Trustee Act, 1893; and s. 9 of that Act is substituted for it. See p. 386, *post.*

6.—(1.) *Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.*

Sect. 6. *Indemnity for breach of trust.*

(2.) *This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act.*

This section was repealed by the Trustee Act, 1893; and s. 45 of that Act is substituted for it. See p. 426, *post.*

7.—(1.) *It shall be lawful for, but not obligatory upon, a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.*

Sect. 7. *Trustee may insure buildings.*

(2.) *This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any cestui que trust upon being requested so to do.*

This section was repealed by the Trustee Act, 1893; and s. 18 of that Act is substituted for it. See p. 401, *post.*

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except

Sect. 8. Statute of Limitations.

Trustee Act, 1888, Sect. 8.

may be pleaded by trustees.

where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

This section modifies the law as enacted by the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 25, and the Judicature Act, 1873, s. 25, sub-s. (2). The Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 10, had already enacted, that sums of money or legacies charged upon land and secured by an express trust should be recoverable only within the same time as if there were not any such trust. It does not follow, notwithstanding the case of *Sutton* v. *Sutton*, 22 Ch. D. 511, that the last-mentioned enactment, though it would release the land, would release the trustee or the testator's general estate.

The general effect of the section is that, except in the three cases of (1) fraud, (2) retention of trust property, and (3) conversion by trustee to his own use, a trustee who has committed a breach of trust is as much entitled to the protection of the several statutes of limitation as if actions or proceedings for breach of trust were enumerated in them. (*How* v. *Earl Winterton*, 1896, 2 Ch. 626. And see *Re Taylor, Atkinson* v. *Lord*, 81 L. T. 812.)

Consequently where trustees paid annuities in full without deducting income tax, which was paid out of the general estate, the section was held to apply, except in the cases where the trustees themselves were annuitants. (*Re Sharp, Rickett* v. *R.*, 1906, 1 Ch. 793.)

The fact that a trustee is also a residuary legatee, and has retained his own share of the residue, is not a conversion to his own use of another share which has been paid away to the tenant for life thereof. (*Re Timmis, Nixon* v. *Smith*, 1902, 1 Ch. 176.)

All members of a firm are bound by the representations of the firm made in the ordinary course of the firm's business; and the fraud of one member committed in the ordinary course of such business will take all of them out of the protection afforded by this section. (*Moore* v. *Knight*, 1891, 1 Ch. 547.) But, in the absence of fraud, one partner is not involved in the liability of another partner. (*Re Gurney, Mason* v. *Mercer*, 1893, 1 Ch. 590.)

The fraud of a solicitor will not take his client out of the protection of the statute. (*Thorne* v. *Heard*, 1894, 1 Ch. 599; affirmed, 1895, A. C. 495.)

Directors of a company are trustees within this section. (*Re Lands Allotment Co.*, 1894, 1 Ch. 616.)

Property "still retained" by the trustee, means property retained at the date of the writ. (*Thorne* v. *Heard*, *supra*.)

Property which a trustee has left in the hands of a co-trustee,

who has made away with it, is not retained within this section. (*Re Tufnell, Byng* v. *Tufnell*, 18 Times L. R. 705.)

A husband who, after his wife's death, carried on for his own benefit a business in which she had a life interest, was held to be a constructive trustee of the business for the remaindermen and to be outside the protection of the section, the business being property retained for his own use. (*M'Ardle* v. *Gaughran*, 1903, 1 I. R. 106.)

The onus of proving that a trustee retains property lies on the person to whose case it is necessary. (*Re Page, Jones* v. *Morgan*, 1893, 1 Ch. 304.)

If claim of tenant for life is barred, but not claims of his children, he has no right to the income of a fund paid into Court by the trustee in satisfaction of a breach of trust. (*Collings* v. *Wade*, 1896, 1 I. R. 340.) Such income may be retained by the trustees for their own use in repayment of the amount found by them to make good the breach of trust. (*Re Somerset*, 1894, 1 Ch. 231.)

In *Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 444, a plaintiff was allowed to amend his pleadings so as to raise a new case, upon condition of allowing the defendant to plead the statute.

This section does not apply to a trustee in bankruptcy. (*Re Cornish*, 1896, 1 Q. B. 99.)

A husband forcibly seized his wife's personal estate. After his death, she commenced proceedings against his executor. It was held that the executor was not protected by this section. (*Wassell* v. *Leggatt*, 1896, 1 Ch. 554.)

(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless

Trustee Act, 1888, Sect. 8.

and until the interest of such beneficiary shall be an interest in possession.

For the form of order against a trustee who is entitled to the protection given by this section, see *Re Davies, Ellis* v. *Roberts*, 1898, 2 Ch. 142.

The time of limitation to an action of debt is fixed at six years by the Limitation Act, 1623, 21 Jac. 1, c. 16, s. 4. Time, in the absence of fraud, begins to run from the date of the breach. (*Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 444; *Thorne* v. *Heard*, 1894, 1 Ch. 599; affirmed, 1895, A. C. 495.) In *Re Swain, S.* v. *Bringeman*, 1891, 3 Ch. 233, Romer, J., seems to have thought that it began to run from the date at which the loss occurred. The form of the pleadings in that case is not consistent with this distinction; and, if strictly construed, the ruling of the learned judge would not have justified him in dismissing the action.

A claim against executors for devastavit may be barred by the statutes of limitation, and *quære* whether the above section applies to such a case. (*Lacons* v. *Warmoll*, 1907, 2 K. B. 350.)

Under the equitable doctrine of *laches*, a *cestui que trust* who came in as reversioner was not always allowed the full analogous legal time of limitation for bringing his claim. (See *Roberts* v. *Tunstall*, 4 Ha. 257.) It is conceived that this enactment will not be so construed as to abridge any existing immunity of trustees.

Notwithstanding the Merc. Law Amendment Act, 1856, s. 14, payment of interest by the continuing partners of a firm will prevent the statute from running in favour of a retired partner, if his retirement was not gazetted. (*Re Tucker, T.* v. *T.*, 1894, 3 Ch. 429.)

Payment of interest by a mortgagor to a tenant for life, will not, as against him, prevent the statute from running in favour of the trustees, if they committed an innocent breach of trust by lending on the mortgage. (*Re Somerset, S.* v. *E. Poulett*, 1894, 1 Ch. 231.)

If executors improperly employ testator's residuary personal estate, bequeathed to them upon express trusts, in carrying on his farming business, their case comes within this section, and not within the R. P. Limitation Act, 1874, s. 8; and consequently, an action by the residuary legatees is barred at the end of six years. (*Re Swain, S.* v. *Bringeman*, 1891, 3 Ch. 233.) But a suit to recover a legacy from an executor comes within the Act of 1874, s. 8, and is not barred until the end of twelve years (*Re Davis, Evans* v. *Moore*, 1891, 3 Ch. 119), unless the executor has become a trustee and is sued as such, in which case the action must be brought within six years. (*Re Timmis, Nixon* v. *Smith*, 1902, 1 Ch. 176.)

A succession of interests vesting in the same beneficiary gives rise to a succession of new causes of action, whereby a later one may be good though an earlier one may be barred. (*Mara*

v. *Browne*, 1895, 2 Ch. 69.) Some other points in that case were reversed on appeal, but the point in question was not appealed.

Time does not begin to run against a trustee, claiming contribution from a co-trustee, until the trustee's liability has been established. (*Robinson* v. *Harkin*, 1896, 2 Ch. 415.) This is on the analogy of the law with reference to claims between co-sureties, as laid down in *Wolmershausen* v. *Gullick*, 1893, 2 Ch. 514.

It is difficult to understand the case of *Leahy* v. *De Moleyns*, 1896, 1 I. R. 206, so far as it bears upon this section. A trustee, or person claiming under him, cannot obtain any greater protection than he would obtain under the ordinary statutes of limitation, if there were no trust in the case.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

This is intended to guard against the possible danger, that of two beneficiaries, one of age and the other an infant, the latter might have the right to bring his claim when the former had become barred; and that, by simply claiming a replacement of the fund, he might be able to recover the share of the other as well as of himself. It is conceived that this enactment was not necessary, though its insertion may have been due to prudent precaution. One *cestui que trust* could in general prosecute his own claim without prosecuting the claims of the others; and though, where no question of a bar could arise, it was usual to claim the replacement of the fund, yet it is conceived that such a claim, even without the present sub-section, would no longer have been proper after the passing of an Act by which the claim to a part of the fund is barred.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

This section does not protect persons served with an order for administration, made after 1st January, 1890, if the action was commenced before that date. (*Re Harrison, Allen* v. *Cort*, W. N. 1892, p. 148.)

Trustee Act, 1888, Sect. 9.

Investments on mortgage of long terms.

9. *A power to invest trust money in real securities shall authorize and shall be deemed to have always authorized an investment upon mortgage of property held for an unexpired term of not less than two hundred years and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent.*

This section was repealed by the Trustee Act, 1893; and s. 5, sub-s. (1) (*a*), of that Act is substituted for it. See p. 381, *post.*

Sect. 10.

Trustees of renewable leaseholds may renew.

10. *It shall be lawful for any trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if he shall in his discretion think fit, and it shall be the duty of such trustee, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustee from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same, unless the consent in writing of such person is obtained to such renewal on the part of the trustee.*

This and the next following section were repealed as stated in the next following note.

Sect. 11.

Power to trustee to raise money to meet fines on renewal of lease.

11. *In case any money shall be required for the purpose of paying for the renewal of any lease as aforesaid, it shall be lawful for the trustee effecting such renewal to pay the same out of any money which may then be in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he shall not have in his hands as aforesaid sufficient money for the purpose, it shall be lawful for the trustee to raise the*

Trustee Act, 1888, Sect. 11.

money required by mortgage of the hereditaments to be contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject; and no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose aforesaid.

This and the last preceding section were repealed by the Trustee Act, 1893; and s. 19 of that Act is substituted for them. See p. 402, *post.*

Sect. 12. *Application of Act.*

12.—(1.) *This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act.*

(2.) *Provided always, that save as in this Act expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.*

Repealed by the Trustee Act, 1893, and replaced by s. 19, sub-s. (3), thereof, p. 404, *post.*

THE TRUSTEE ACT, 1893.

(56 & 57 Vict. c. 53.)

An Act to consolidate Enactments relating to Trustees.
[22nd September, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

PART I.

Investments.

Sect. 1. Authorized investments.

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

"Trust" and "trustee" are defined by s. 50, *post*, p. 432. Under the T. A. 1888, s. 8 (*ante*, p. 369), it has been held that trustee includes the director of a company (*Re Lands Allotment Co.*, 1894, 1 Ch. 616), and under the T. A. 1889, which is repealed by this Act, it has been held that trustee includes a corporation holding funds for charitable purposes (*Re Manchester Royal Infirmary*, 43 Ch. D. 420), but not persons holding the funds of a building society to be invested at the direction of the board (*Re National Permanent Building Society*, 43 Ch. D. 431), though as to the latter, see now Building Societies Act, 1894, s. 17.

The words "whether at the time in a state of investment or not" only express what was held to have been implied in the T. A. 1889. (See *Hume* v. *Lopes*, 1892, A. C. 112.)

Funds in Court cannot be invested in securities forbidden by the settlor, although authorized by R. S. C. Ord. 22, r. 17. (*Ovey* v. *Ovey*, 1900, 2 Ch. 524.)

As to the meaning of the words "expressly forbidden," see *Re Maire*, 49 Sol. Journ. 383; *Re Burke*, *Burke* v. *B.*, 1908, 2 Ch. 248. A direction to invest funds in a particular way is not enough. (*Ibid.*)

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom ;

(b) On real or heritable securities in Great Britain or Ireland :

Real security in Ireland has been held to include leaseholds for lives perpetually renewable at a head rent, that being the common tenure of land in Ireland. (*Macleod* v. *Annesley*, 16 Bea. 600.) But the ordinary power to invest on a real security does not authorize an advancement upon leaseholds for however long a term. (*Re Chennell, Jones* v. *Chennell*, 8 Ch. D. 492 ; *Re Boyd's S. E.*, 14 Ch. D. 626 ; *Leigh* v. *Leigh*, 56 L. J. Ch. 125.) Sect. 5 (*post*, p. 381), which enables a trustee having power to invest on real securities to invest on mortgage of property held for a long term, would, if construed strictly, apply only to a trustee who is expressly authorized by the settlement to invest on real securities, and not to one whose powers of investment are contained only in this section.

(c) In the stock of the Bank of England or the Bank of Ireland :

(d) In India three and a half per cent. stock and India three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of act of parliament, and charged on the revenues of India :

(e) In any securities the interest of which is for the time being guaranteed by Parliament :

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the receiver for the Metropolitan Police District :

(g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock :

By R. S. C. Ord. 22, r. 17, cash under the control of or subject to the order of the Court, may be invested on debenture, preference, guaranteed or rentcharge stocks of railways in

Trustee Act, 1893, Sect. 1.

Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares. And as this order is incorporated by sub-s. (*o*), *post*, it follows that this class of securities is somewhat wider than is stated in this sub-section.

By s. 4 of the T. A. 1894 (*post*, p. 436), it is provided that a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an authorized investment. Consequently a trustee is not bound to realize an investment which has been made under sub-s. (*g*), if the company should fail in any year to pay a dividend on its ordinary stock.

By s. 50 (*post*, p. 431), "stock" includes fully paid-up shares.

See *Elve* v. *Boyton*, 1891, 1 Ch. 501, and *Re Smith, Davidson* v. *Myrtle*, 1896, 2 Ch. 590, as to the meaning of the words "company incorporated by Act of Parliament" in an investment clause.

The powers under sub-s. (*g*) are not enlarged by s. 5 (3) so as to enable trustees to invest in nominal debentures, issued under the Local Loans Act, 1875, as the latter sub-section is confined to the enlargement of express powers of investment. (*Re Tattersall, Topham* v. *Armitage*, 1906, 2 Ch. 399.)

(h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (*g*), either alone or jointly with any other railway company:

(i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity class D. and annuities comprised in the

register of annuitants class C. of the East Indian Railway Company:

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by royal charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or provisional order:

See *Re Druitt*, 1903, 1 Ch. 446, as to when a borough satisfies the provisions of this sub-section.

(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorized by law to be levied:

(o) In any of the stocks, funds, or securities for

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the time being authorized for the investment of cash under the control or subject to the order of the High Court,

See note to sub-s. (*g*), *ante*,

and may also from time to time vary any such investment.

By s. 2 of the Colonial Stock Act, 1900, 63 & 64 Vict. c. 62, it is provided that the securities in which a trustee may invest under the powers of the T. A. 1893, shall include any colonial stock which is registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 and 1892, as amended by the Act of 1900, and with respect to which there have been observed such conditions (if any) as the Treasury may by order notified in the London Gazette prescribe.

Sect. 2. Purchase at a premium of redeemable stocks.

2.—(1.) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

Sect. 3. Discretion of trustees.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

If such consent is improperly withheld, the Court will dispense with it. (*Harrison* v. *Thexton*, 4 Jur. N. S. 550.)

Trustee Act, 1893, Sect. 4.

Application of preceding sections.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Sect. 5.

Enlargement of express powers of investment.

5.—(1.) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

Sub-s. (1) (*a*) replaces T. A. 1888, s. 9.

The word "power" will perhaps be held to include a general authority given by statute; though it would more aptly be restricted to express powers inserted in a settlement. If the wider view is adopted, this provision, by virtue of s. 1, sub-s. (*b*), *ante*, will in practice be applicable to all trusts. *Re Tattersall, Topham* v. *Armitage*, 1906, 2 Ch. 399, is an authority for applying the narrower construction.

As to the enlargement of long terms into a fee simple, see notes on the Conv. Act, 1881, s. 65, p. 160, *ante*. It will be observed that the terms contemplated by this section are not necessarily capable of enlargement.

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

Sub-s. (*b*) re-enacts 27 & 28 Vict. c. 114, s. 60, which is repealed by this Act so far as it relates to trustees.

(2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorizing the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

Sub-s. (2) re-enacts the Debenture Stock Act, 1871 (34 Vict. c. 27), which is repealed by this Act.

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(3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

Sub-s. (3) re-enacts s. 27 of the Local Loans Act, 1875, 38 & 39 Vict. c. 83, which is repealed by this Act.

This sub-section only applies where trustees have an express power to invest in railway debentures, and not where such a power is merely acquired under the provisions of s. 1 (*g*), *ante*, p. 377. (*Re Tattersall, Topham* v. *Armitage*, 1906, 2 Ch. 399.)

(4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the Government of a colony, may, unless the contrary is expressed in the instrument authorizing the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

Sub-s. (4) re-enacts s. 7 of the Isle of Man Loans Act, 1880, 43 & 44 Vict. c. 8, which is repealed by this Act so far as it relates to trustees.

(5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

Sub-s. (5) re-enacts 28 & 29 Vict. c. 78, s. 40, which is repealed by this Act.

Sect. 6. Power to invest, notwithstanding drainage charges. 10 & 11 Vict. c. 32.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland)

Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

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This section re-enacts 9 & 10 Vict. c. 101, s. 37; 10 & 11 Vict. c. 32, s. 53; and 27 & 28 Vict. c. 114, s. 61, all of which are repealed by this Act.

7.—(1.) A trustee, unless authorized by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(a) The India Stock Certificate Act, 1863;
(b) The National Debt Act, 1870;
(c) The Local Loans Act, 1875;
(d) The Colonial Stock Act, 1877.

(2.) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorized to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

Sect. 7. Trustees not to convert inscribed stock into certificates to bearer. 26 & 27 Vict. c. 73. 33 & 34 Vict. c. 71. 38 & 39 Vict. c. 83. 40 & 41 Vict. c. 59.

This section re-enacts 26 & 27 Vict. c. 73, s. 4; 33 & 34 Vict. c. 71, s. 29; 38 & 39 Vict. c. 83, s. 21; and 40 & 41 Vict. c. 59, s. 12, all of which are repealed by this Act.

8.—(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the

Sect. 8. Loans and investments by trustees not chargeable as breaches of trust.

Trustee Act, 1893, Sect. 8.

loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

Section 8 replaces s. 4 of the T. A. 1888.

The requirements of the section constitute a standard for judging whether the conduct of the trustee in making the investment has been reasonable, though non-compliance with those requirements is not necessarily a fatal obstacle to an application for relief under the Judicial Trustee Act, 1896. (*Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 583.) The decision of Stirling, J., in this case contains some valuable observations on the precautions which trustees should observe in making investments upon mortgage.

This sub-section was intended to modify the rule adopted by courts of equity, that in lending money upon the security of buildings, not more than half their value must be lent. It also overrules certain objections taken to the method of valuation adopted by the trustees in *Fry* v. *Tapson*, 28 Ch. D. 268, by reason of their having appointed a valuer not resident in the locality.

In order that the trustee may obtain the protection of this section, the following conditions must be fulfilled :—

(1.) The trustee must obtain an independent report from a competent surveyor ;

(2.) The report must state the market value of the property : it will not suffice to state the amount for which the valuer thinks the property a good security ;

(3.) The report must advise that the property is a sufficient security for the proposed loan ; and

(4.) The trustee must act upon the faith of the report.

As to the phrase "able practical surveyor," see note on S. L. Act, 1882, s. 26, sub-s. 2 (ii.), p. 276, *ante*.

If the surveyor's fees are ultimately paid by the borrower, this circumstance must not be disclosed to the surveyor pending the preparation of his report ; because this knowledge is considered to affect his independence ; so is a provision that he is to receive no fee if the transaction falls through. (*Marquis of Salisbury* v. *Keymer*, W. N. 1909, p. 31 ; *Re Dive, Dive* v. *Roebuck*, 1909, 1 Ch. 328.)

As to the general duty of trustees in making investments, see *Re Whiteley, W.* v. *Learoyd*, 33 Ch. D. 347 ; aff. in Dom. Proc. 12 App. Cas. 727. It must not be supposed that when once the value of the property has been ascertained, valuers are, whatever might be its nature or the method of valuation adopted, at least *primâ facie* justified in advising an advance of two-thirds of its value. If the property is liable to deteriorate, a prudent man must require a larger margin for his protection. (*Shaw* v. *Cates*, 1909, 1 Ch. 389.)

The words, "believed to be," do not refer to the words "instructed and employed," &c. It is incumbent on the trustee

to prove such instruction and employment. (*Re Walker*, 59 L. J. Ch. 386; *Re Somerset, S.* v. *Earl Poulett*, 1894, 1 Ch 231.)

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(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

This provision has commonly been inserted in investment clauses which authorize the investment of trust money upon leaseholds. It is nevertheless doubtful whether the provision would justify trustees in lending money upon beneficial leaseholds of recent date, without obtaining any information, at least by way of general reputation, as to the lessor's title. The general rule as to taking precautions seems to be as follows :— (1) If an unauthorized investment is made, the trustee is liable for any loss, no matter what precautions he may have taken; but (2) in making authorized investments, he is bound to take reasonable precautions to avoid loss, which should be somewhat in excess of the standard suggested by experience of what is often done by men of ordinary prudence in dealing with their own affairs : such last-mentioned degree of precaution, though sufficient in the general administration of the trust, not being sufficient when the question relates to the making of investments. (See on both points, *Re Salmon, Priest* v. *Uppleby*, 42 Ch. D. at p. 367.)

(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

Before the Trustee Act, 1888, upon a purchase of land, or an investment upon the security of land, by trustees, it was theoretically their duty, unless expressly authorized by the trust to accept a shorter title, to require a good marketable title to be traced back for the legal period; which now, by the V. & P. Act, 1874, s. 1, is ordinarily forty years. Courts of equity, however, have frequently sanctioned an investment upon less than a technically good marketable title. (See *Re Sheffield &c. Rail. Co.*, 1 Sm. & Giff. Appendix, p. iv.; *Meyrick* v. *Laws*, 34 Beav. 58, at p. 59.)

Trustee Act, 1893, Sect. 8.

(4.) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

It is conceived that the language of this sub-section will be restricted to actions and proceedings having for their primary object the charging of a trustee in respect of a breach of trust.

Sect. 9. Liability for loss by reason of improper investments.

9.—(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2.) This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

Sect. 9 replaces s. 5 of the T. A. 1888.

This alters the previous rule of the Court, by which, in cases of improper investment, the trustees, if held liable at all, were disallowed the whole amount of the investment. (See *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Bell* v. *Turner*, W. N. 1874, p. 113; *Re Whiteley*, *W.* v. *Learoyd*, 33 Ch. D. 347; affirmed, 12 App. Cas. 727.) The result was usually, in practice, that the trustee paid the amount represented by the investment, and took over the investment for his own benefit. But there is a distinction in this respect between an investment of an unauthorized description and an investment which is of an authorized description, but improvidently made; for it seems that, in the former case, the defaulting trustee has the absolute right to take over the investment if he replaces the fund, but that in the latter case he has not, and the investment may be realized without his consent, he being charged with the resulting loss. (*Re Salmon*, *Priest* v. *Uppleby*, 42 Ch. D. 351; *Re Hotham*, 1902, 2 Ch. 578.) See also *Re Massingberd*, *Clark* v. *Trelawny*, 63 L. T. 296, and *Head* v. *Gould*, 1898, 2 Ch. 250, where it was held that the rule which entitles a trustee to have an unauthorized

security transferred to him does not apply when the *cestui que trust* is an infant.

Trustee Act, 1893, Sect. 9.

The trustee must prove the propriety of the investment. (*Jones* v. *Julian*, 25 L. R. Ir. 45; *Want* v. *Campain*, 9 Times L. R. 254.) See also *Re Turner, Barker* v. *Ivimey*, 1897, 1 Ch. at p. 541, *Blyth* v. *Fladgate*, 1891, 1 Ch. at p. 353, there referred to, and *Shaw* v. *Cates*, 1909, 1 Ch. 389.

PART II.

Various Powers and Duties of Trustees.

Appointment of New Trustees.

Sect. 10. Power of appointing new trustees.

10.—(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

Sect. 10, except as noted below, replaces Conv. Act, 1881, s. 31.

Trustees cannot be appointed to take the place and exercise the functions of executors. (*Eaton* v. *Daines*, W. N. 1894, p. 32.)

If a person is appointed both executor and trustee, he becomes a trustee *simpliciter* as soon as the personal estate is fully administered. (*Re E. of Stamford, Payne* v. *Stamford*, 1896, 1 Ch. 288.)

The power conferred by this section may be exercised, although the settlement was made before the Act, and the occasion of appointing the new trustee is for the first time provided for by the Act. (*Re Walker and Hughes*, 24 Ch. D. 698.)

The power may also be exercised although the executors of

Trustee Act, 1893, Sect. 10.

the last surviving trustee in whom the trust property is vested under section 30 of the Conveyancing Act, 1881, have themselves acted as trustees. (*Re Routledge, Saul* v. *Routledge*, 1909, 1 Ch. 280.)

The words "personal representatives of the last surviving or continuing trustee," include the executor of a sole trustee (*Re Shafto's Trusts*, 29 Ch. D. 247), and the surviving executors of a sole trustee. (*Re Howarth, H.* v. *Makinson*, 44 L. J. Newsp. 79.)

Where the will of a testator who died in 1877 incorporated the provisions of Lord Cranworth's Act as to the appointment of new trustees, those provisions were held to be still applicable notwithstanding the repeal of that Act by the Conv. Act, 1881. (*Re Boucherett, Barne* v. *Erskine*, 1908, 1 Ch. 180.)

In ordinary cases, where the statutory power can be exercised, it is not proper to apply to the Court. (*Re John Gibbons' Trusts*, W. N. 1882, p. 12; 30 W. R. 287.) Such applications are liable to be dismissed with costs. (*Re Oakden's Trusts*, 26 Sol. Journ. 563.) But in a proper case the Court will exercise its jurisdiction to appoint trustees; as, for example, where the last surviving trustee has died, after committing a breach of trust which renders it inexpedient that new trustees should be appointed by his personal representatives (see *Re Pilling's Trusts*, 27 Sol. Journ. 199); or where the nature of the trust property is such that a vesting order is necessary.

Representatives of a deceased trustee cannot be compelled to exercise the power to appoint new trustees given by this section; nor will they incur liability to pay costs by reason of their refusal. (*Re Knight's Will*, 26 Ch. D. 82.)

If the persons in whom a joint power to appoint is vested cannot agree, the Court will make the appointment. (*Re Tempest*, L. R. 1 Ch. 485.)

The Court has no jurisdiction to appoint new trustees, even on the application of a majority of the beneficiaries, against the wish of the legal personal representative of the last surviving trustee, who is able and desirous to exercise the statutory power. (*Re Higginbottom*, 1892, 3 Ch. 132.)

A decree for the administration of the trusts does not take away a power to appoint new trustees; but if the Court should disapprove of the selection made, it will require the appointor to make a fresh nomination. (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134.)

The donee of the power, if acting in good faith, may appoint persons who would not ordinarily be appointed by the Court, *e.g.*, the solicitor to the tenant for life. (*Re E. of Stamford, Payne* v. *Stamford*, 1896, 1 Ch. 288.)

Where a power contained in a settlement, which is exercisable only with consent of a beneficiary, has ceased to be exerciseable, the fact that such power was subject to such consent is not the expression of a "contrary intention" within the meaning of sub-s. (5), *infra*, so as to prevent the statutory power from being exerciseable without such consent. (*Cecil* v. *Langdon*, 28 Ch. D. 1; *Cradock* v. *Witham*, W. N. 1895, p. 75.)

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And if the instrument creating the trust enumerates certain events upon which the donee of a power may appoint new trustees, he is restricted to those events; and on the occurrence of any other event specified in this section, the statutory power becomes exerciseable. (*Re Wheeler and De Rochow*, 1896, 1 Ch. 315.)

The persons empowered by this section to act may appoint new trustees, when the settlement confers an express power upon other persons, if the latter persons, though willing, are by reason of special circumstances unable to act. (*Re Sheppard's Settmt. Trusts*, W. N. 1888, p. 234.)

This section will not authorize the other trustees to make an appointment in the place of a trustee who is an infant. (*Re Tallatire*, W. N. 1885, p. 191.) Nor will it authorize the donee of a power of appointment to appoint himself. (*Re Skeats' Settmt., Skeats* v. *Evans*, 42 Ch. D. 522; followed *Re Newen, Newen* v. *Barnes*, 1894, 2 Ch. 297, and *Re Sampson*, 1906, 1 Ch. 435, and approved, *Re Shortridge*, 1895, 1 Ch. 278.) Nor will it authorize a last surviving trustee by his will to appoint new trustees in succession to himself. (*Re Parker's Trusts*, 1894, 1 Ch. 707.) But there is no general rule that in cases not coming within the Act a donee may not appoint himself, and the Court will sanction such an appointment in special circumstances. (*Montefiore* v. *Guedalla*, 1903, 2 Ch. 723.)

By s. 2, sub-s. (xvii.), of Conv. Act, 1881, of which this section originally formed part, "person" includes a corporation. The present Act contains no such provision. Under the earlier Act, North, J., in *Re Brogden, Billing* v. *Brogden*, W. N. 1888, p. 238, expressed the opinion that he had no power to appoint a corporation to be a trustee. But the difficulty has been removed by the passing of the Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vict. c. 20. (*Re Thompson's Settmt.*, 1905, 1 Ch. 229.)

If one trustee, who also has a sole power of appointing new trustees, becomes lunatic, a trustee may be appointed in his place under this section. See *Re Blake*, W. N. 1887, p. 173; where, however, the appointment was made by the Court under s. 137 of the Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70. Under the Lunacy Act, 1890, 53 & 54 Vict. c. 5, ss. 128, 129, the Court has jurisdiction to authorize the committee of a lunatic to exercise on his behalf a power to appoint new trustees. (*Re Shortridge*, 1895, 1 Ch. 278.)

It has been held that this section extends to a case in which a private Act incorporated the corresponding section of Lord Cranworth's Act, with the restriction, that every appointment must be made with the approval of the Court; and the power conferred by this section may now be exercised discharged from the restriction. (*Re Lloyd's Trusts*, W. N. 1888, p. 20.)

It has been held that the donee of a power to appoint new trustees, who has an interest in the settled fund, may exercise the power after parting with his interest. (*Hardaker* v. *Moorhouse*, 26 Ch. D. 417; but see *Re Bedingfield and Herring*, 1893, 2 Ch. at p. 337.)

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When the appointment of successors to certain of the trustees is by the settlement given to one party, and the appointment of successors to others of them is given to another party, the section is separately applicable to the different cases; so that, if, by reason of the circumstances, a new trustee of a particular class cannot be appointed by the donee of the power to appoint new trustees of that class, an appointment of a trustee of that class may be made under the statutory power. (*Re Cutler, Re Stephens' Trusts*, 39 Sol. Journ. 484.)

This section does not provide for the case of all the trustees appointed by a will dying in the testator's lifetime.

Trustees for purposes of the S. L. Acts can now be appointed under this section. (See s. 47, p. 428, *post*.)

As to when a trustee "remains out of the United Kingdom for more than twelve months," see *Re Walker*, *Summers* v. *Barrow*, 1901, 1 Ch. 259.

(2.) On the appointment of a new trustee for the whole or any part of trust property—

(a) the number of trustees may be increased; and

The Court had power, under s. 32 of the Trustee Act, 1850, now replaced by s. 25, sub-s. (1) of the present Act, to increase the number of the trustees, although there might be no vacancy. (*Re Brackenbury's Trusts*, L. R. 10 Eq. 45.) But it does not appear that under the present section any appointment can be made without a vacancy. (See *Re Gregson's Trusts*, 34 Ch. D. 209.) Under sub-s. (*c*) and s. 11, *infra*, the number of trustees, if greater than two, may be decreased by voluntary retirement. The Court, acting under the Trustee Act, 1850, would not remove a trustee without appointing a successor (see note on the next section); nor on the appointment of new trustees would the Court reduce the number (see *Re Gardiner's Trusts*, 33 Ch. D. 590); unless, perhaps, under special circumstances (see *Re Fowler's Trusts*, W. N. 1886, p. 183). But there is nothing to prevent a person, exercising the power given by this section, from filling up less than the whole number of vacancies.

In particular cases the wording of the instrument containing the power has been held to authorize such increase or reduction. In *Meinertzhagen* v. *Davis*, 1 Coll. 335, the appointment of three trustees in place of two, in *Re Breary*, W. N. 1873, p. 48, of two in place of one, and in *Re Pool Bathurst's Estate*, 2 Sm. & Giff. 169, of two in place of three, was upheld. In *Cunningham to Wilson*, W. N. 1877, p. 258, Jessel, M.R., said that he was not aware of any rule making it compulsory on the donees of a power when appointing new trustees to keep up the full number, except in the case of a charity, and that if a testator wished the number to be kept up he must expressly say so. This case was followed in *West of England &c. Bank* v. *Murch*, 23 Ch. D. 138, in which the appointment of one trustee in the place of two, one of whom had disclaimed without acting, was

upheld; but it seems to be at variance with *E. of Lonsdale* v. *Beckett*, 4 De G. & Sm. 73, where the appointment, by a retiring trustee, of a sole trustee of an instrument by which three had originally been appointed, was held to be invalid. The appointment of four trustees in the place of three was held bad in *Ex pte. Davis*, 2 Y. & C. C. C. 468. (See also Lewin on Trusts, 11th ed. p. 802; Chance on Powers, s. 2568.)

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

Sub-s. (*b*) replaces Conv. Act, 1882, s. 5, and Conv. Act, 1892, s. 6.

This provision confers a power, which has been frequently exercised by the Court, to appoint separate trustees of separate shares of trust property. (See *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Grange, Cooper* v. *Todd*, W. N. 1881, p. 50; *Re Dennis' Trusts*, 12 W. R. 575; *Re Cunard's Trusts*, 27 W. R. 52; *Re Moss's Trusts*, 37 Ch. D. 513.)

The language, "held on trusts distinct,"&c., suggests that it will be sufficient if, at the time of the appointment, the trusts are distinct, although that part of the property may originally have been held upon trusts partly identical with those on which some other part is or was held.

The language leaves it doubtful whether an appointment of separate trustees of a separate part may be made under this section for the mere purpose of abstracting that part from the custody of existing trustees who are allowed to remain in custody of the residue. If such an appointment is desirable, an application should be made to the Court, under s. 25, sub-s. (1), of the present Act, and not under this section; see *Savile* v. *Couper*, 36 Ch. D. 520; *Re Moss's Trusts*, 37 Ch. D. 513. Under Conv. Act, 1882, s. 5, it was doubtful whether, after a total extinction of trustees, new trustees could be appointed of a part of the fund without also appointing new trustees of the residue, and it was held by Porter, M.R., in an Irish case, that no appointment could be made under that section except upon the occasion of an appointment of new trustees for the entire trust property. (*Re Nesbitt's Trusts*,

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19 L. R. Ir. 509.) The Court of Appeal, in affirming this decision, did not decide the question of jurisdiction. There is no reason to doubt that the parties themselves, without the aid of the Court, might, under this section, have done what was done by the Court in *Re Paine's Trusts*, 28 Ch. D. 725; where the existing or continuing trustee was joined with the newly-appointed separate trustees. It is no obstacle to the exercise of the power that the separate trusts may, under certain contingencies, coalesce. (*Re Hetherington's Trusts*, 34 Ch. D. 211.)

It is conceived that the power given by this section cannot be exercised, unless the separate trust properties are already severed, or are immediately severable.

In a case where one trustee absconded with part of the trust funds, leaving only a part which was subject to separate trusts, the Court appointed trustees of the separate share, under the Trustee Act, 1850. (*Re Aston's Trusts*, 25 L. R. Ir. 96.)

(c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

New trustees are not fixed with notice of matters known to retiring trustees, not disclosed and not discoverable by reference to the documents relating to the trust; and it makes no difference whether the trust property does or does not vest in the new trustees. (*Hallows* v. *Lloyd*, 39 Ch. D. 686.)

(4.) The provisions of this section relative to a trustee who is dead include the case of a person

nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

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A retiring trustee is not a necessary party to the appointment. (See *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333.) If not willing to act, a retiring trustee is not included; and the onus of proving that he was willing to act lies upon the person raising the objection. (See *Re Coates to Parsons*, 34 Ch. D. 370.) If a trustee's conduct has amounted to a disclaimer, he cannot afterwards act, and cannot convey the legal estate. (*Re Birchall, Birchall* v. *Ashton*, 40 Ch. D. 436.) Conduct may amount to a disclaimer. (*Stacy* v. *Elph*, 1 My. & K. 195.)

This sub-section does not enable the personal representative of a trustee, appointed by will and dying in the testator's lifetime, to appoint a new trustee in the place of the deceased trustee. (*Nicholson* v. *Field*, 1893, 2 Ch. 511.)

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

The mere fact that a settlement contains an express power to appoint new trustees, is not the expression of a contrary intention. If, by reason of circumstances, the express power cannot be exercised, the statutory power is exerciseable. (*Re Sheppard's Settmt. Trusts*, W. N. 1888, p. 234; *Cradock* v. *Witham*, W. N. 1895, p. 75.)

(6.) This section applies to trusts created either before or after the commencement of this Act.

11.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Sect. 11. Retirement of trustee.

(2.) Any assurance or thing requisite for vesting

Trustee Act, 1893, Sect. 11.

the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

Sect. 11 replaces Conv. Act, 1881, s. 32.

Sect. 10, sub-s. (2) (*c*), p. 392, *ante*, enables the number of trustees to be reduced to not less than two, but the only case to which that provision applies is that of a new appointment. The present section sanctions such reduction when no new appointment is made, but the retiring trustee must declare by deed his desire to be discharged.

This provision enables trustees to effect what the Court, acting under the Trustee Act, 1850, after some vacillation, refused to do. In *Re Stokes' Trusts*, L. R. 13 Eq. 333, Lord Romilly appointed two continuing trustees to be sole trustees. This was followed by Jessel, M.R., in *Re Harford's Trusts*, 13 Ch. D. 135, and *Re Watson*, 19 Ch. D. 384; and by V.-C. Malins in *Re Tatham's Trusts*, W. N. 1877, p. 259; *Re Gibbin's Trusts*, W. N. 1880, p. 99; and *Re Northrop*, W. N. 1880, p. 184; 29 W. R. 134. But in *Re Colyer*, W. N. 1880, p. 131; 50 L. J. Ch. 79, Cotton, L.J., following his previous decision in *Re Nash*, 16 Ch. D. 503, refused to follow these cases. Jessel, M.R., in *Re Aston*, 23 Ch. D. 217, expressly stated that he adhered to his former opinion, though he intended to follow *Re Colyer*, in order to avoid a difference in the practice of the judges of the Court. If the fund is immediately divisible, a lunatic, &c., trustee may be removed, without appointing a new trustee in his place. (*Re Martyn*, 26 Ch. D. 745.) In *Re Lamb's Trusts*, 28 Ch. D. 77, Pearson, J., assumed that the rule in *Re Colyer*, *supra*, is now the rule of the Court. (See also *Re Ray*, 47 L. T. 500; *Re Mace's Trusts*, W. N. 1887, pp. 232, 238.)

In any action to administer a trust the Court has jurisdiction to discharge a trustee without appointing a new trustee in his place, though this cannot be done under s. 25 of the Act. (*Re Chetwynd's Settmt., Scarisbrick* v. *Nevinson*, 1902, 1 Ch. 692.)

On one of four trustees becoming lunatic, the Court in Lunacy has jurisdiction under the Lunacy Act, 1890, ss. 135, 136, to vest the trust property in the other three. (*Re Leon*, 1892, 1 Ch. 348.)

This section is now applicable to trustees for purposes of the S. L. Acts. See s. 47, p. 428, *post*.

Sect. 12. Vesting of

12.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declara-

trust property in new or continuing trustees.

tion by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Sect. 12 replaces Conv. Act, 1881, s. 34.

The power of vesting conferred by this sub-section is applicable to—

(1) estates and interests in lands:
except by virtue of sub-s. (3)—(a) legal estates and interests in copyholds:
(b) estates and interests held by way of mortgage:

(2) interests in chattels:

(3) choses in action:
except, by virtue of sub-s. (3), shares, stocks, &c., transferable as there mentioned.

It is conceived that this section only enables the declaration to add a new link to a title which is otherwise complete, and that it would not enable property to be vested in new trustees which had passed wholly out of the legal control of the old ones. For general remarks upon the operation of the section, see note at end.

A mortgagor who declares himself trustee of the legal estate in favour of an equitable mortgagee, is a trustee within this section. (*Lond. and Cty. Bkg. Co.* v. *Goddard*, 1897, 1 Ch. 642.)

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or

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to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

Equitable estates in copyholds, when already subsisting, pass by assignment under the former law, and will doubtless pass by such declaration as is contemplated in this section. It may be a question whether, where no separate equitable interest is subsisting, and only legal copyholds are vested in trustees, such a declaration would pass a right similar to that which is acquired by a covenant to surrender. As against the lord, no right seems to be acquired.

Where a transfer of a trust estate, which comprises certain of these excepted particulars, cannot be obtained, the Court will by an order vest the trust estate in new trustees who have been duly appointed. (*Re Harrison's Settmt. Trusts*, W. N. 1883, p. 31; *Re Keeley's Trusts*, 53 L. T. 487.)

Where a trustee had been properly appointed, in the place of a lunatic, the Court would not purport to re-appoint him merely for the purpose of giving itself jurisdiction, under the Trustee Act, 1850, s. 34, to make a vesting order. (*Re Vicat*, 33 Ch. D. 103; *Re Dewhirst's Trusts*, *ibid.* 416.) In *Re Batho*, 39 Ch. D. 189, a mode of vesting the property in the existing trustees, by virtue of ss. 3 and 5 of that Act, was adopted. As to vesting orders, see now ss. 26—36 of the present Act, *post*.

Sub-sect. (3) does not apply to the case where a mortgagor declares himself trustee of the land on behalf of an equitable mortgagee. (*London and County Banking Co.* v. *Goddard*, 1897, 1 Ch. 642.)

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

In cases where a trustee is discharged from the trust, and, by reason of his absence or incapacity, his concurrence in transferring the property cannot be obtained, this section conveniently enables the trust property to be transferred without his concurrence. But where such concurrence can easily be obtained, there is no apparent motive to substitute a declaration for a conveyance; and in all cases where the trust estate includes

property in respect of which it is not desirable to place the trust upon the title, the old practice of conveying by a separate deed should still be adopted, and the declaration made under this section, if any, should be limited to that part of the property to which the objection does not apply.

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The word "deed" is emphatic, and is contrasted with the word "writing" in s. 10, sub-s. (1), p. 387, *ante*.

The mere appointment of new trustees does not, it is conceived, suffice to vest equitable estates in them. Equitable estates appear to need formal conveyance no less than legal estates (*Tasker* v. *Small*, 3 My. & Cr. 63, at p. 70); and such conveyances need formal limitation of the estates conveyed (1 Prest. Abstr. 146), though the interests of the parties themselves may be sufficiently bound by any contract (*Tasker* v. *Small*, *supra*); but even a purchaser cannot, before conveyance, enforce his rights against a stranger. (*De Hoghton* v. *Money*, L. R. 2 Ch. 164.)

In *Dodson* v. *Powell*, 18 L. J. Ch. 237, it was decided, not that equitable interests passed without conveyance to the new trustees upon their appointment, but that, there being nothing vested in the old trustees which they could convey, they could not be compelled to execute any conveyance.

As to vesting trust property belonging to religious bodies, see 13 & 14 Vict. c. 28; of which s. 5 was repealed by 38 & 39 Vict. c. 66. As to stamps, see *Hadgett* v. *Commrs. of Inl. Rev.*, 3 Ex. D. 46.

Purchase and Sale.

13.—(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

Sect. 13. Power of trustee for sale to sell by auction, &c.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation

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after the thirty-first of December one thousand eight hundred and eighty-one.

Sect. 13 replaces Conv. Act, 1881, s. 35.

Trustees selling a property in lots under this section may adopt any usual and proper mode of sale. Thus they may carry out the sale of leaseholds in lots by means of the grant of an under-lease with a nominal reversion. (*Re Judd, Poland and Skelcher's Contract*, 1906, 1 Ch. 684, overruling on this point *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383.)

Trustees having a power of sale might formerly have concurred with other vendors, although not expressly authorized so to do, if the trust property would thereby fetch a better price. See *Cooper to Harlech*, 4 Ch. D. 802, at p. 816, a case which in some measure weakens, or explains away, *Rede* v. *Oakes*, 4 De G. J. & S. 505. But the onus of showing that such method of sale was beneficial rested with the trustees. As to the apportionment of the purchase-money, see *Morris* v. *Debenham*, 2 Ch. D. 540; *Cooper to Harlech*, 4 Ch. D. 802. Trustees cannot concur with other lessors in making a single lease of adjoining properties. (*Tolson* v. *Sheard*, 5 Ch. D. 19.)

As to the circumstances which will put an end to a trust for, or power of, sale, see *Lantsbery* v. *Collier*, 2 K. & J. 709; *Peters* v. *Lewes, &c. Railway*, 18 Ch. D. 429; *Re Cotton and Sch. Bd. for Lond.*, 19 Ch. D. 624; *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Lord Sudeley and Baines*, 1894, 1 Ch. 334; *Re Jump, Galloway* v. *Hope*, 1903, 1 Ch. 129.

Sect. 14. Power to sell subject to depreciatory conditions.

14.—(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section applies only to sales made after

the twenty-fourth day of December one thousand eight hundred and eighty-eight.

Trustee Act, 1893, Sect. 14.

Sect. 14 replaces s. 3 of the T. A. 1888.

As to the aim of this section, and the restriction which it is intended to remove, see note on s. 3, sub-s. (11), of Conv. Act, 1881, p. 24, *ante*.

The general effect seems to be as follows:—

(1.) The sale cannot now be impeached at all, unless the consideration is inadequate; that is, in effect, unless actual damage appears to have been incurred.

(2.) After the completion of the contract, the sale cannot be impeached as against the purchaser unless he was colluding with the vendor at the inception of the contract.

(3.) As the completion of the contract will (in the absence of fraud in its inception) give the purchaser a secure title, so far as this particular objection is concerned, he is reasonably precluded from refusing to complete upon this ground.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874.

Sect. 15. Power to sell under 37 & 38 Vict. c. 78.

This replaces the V. & P. Act, 1874, s. 3.

Compare Conv. Act, 1881, s. 66, p. 166, *ante*.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a *feme sole*.

Sect. 16. Married woman as bare trustee may convey.

This replaces the V. & P. Act, 1874, s. 6. A mortgagee trustee who had been paid off and was reconveying was held to be a bare trustee under this section. (*Re Howgate and Osborn*, 1902, 1 Ch. 451.)

By s. 1 of the M. W. P. Act, 1907, a married woman may without her husband dispose of real or personal property held by her as trustee as if she were a *feme sole;* see the Act, *post*, p. 488.

Compare the M. W. P. Act, 1882, s. 18, p. 475, *post;* and see *Re Docwra, D.* v. *Faith*, 29 Ch. D. 693, and other cases cited in note thereto.

Various Powers and Liabilities.

17.—(1.) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any

Sect. 17. Power to authorize

Trustee Act, 1893, Sect. 17.

receipt of money by banker or solicitor.

44 & 45 Vict. c. 41.

money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

This section replaces s. 2 of the T. A. 1888.

The effect of this sub-section seems to be, to place payments made to a solicitor on behalf of trustees upon the same footing, so far as the validity of the discharge is concerned, as any other payments made to a solicitor by virtue of s. 56 of Conv. Act, 1881; as to which, see note thereon, p. 150, *ante*.

"By reason *only* of his having made or concurred in making any such appointment": the word *only* seems to be emphatic. The trustee is bound to exercise reasonable discretion in choosing a solicitor worthy of the confidence to be reposed in him. The solicitor to receive the trust money must be appointed by the trustee himself; and a purchaser who has notice of a defect in his appointment cannot safely pay to him. (*Re Hetling and Merton*, 1893, 3 Ch. 269.) But in the absence of suspicious circumstances, he could not reasonably demand proof. (*Ibid.* at p. 280.)

"I have no doubt myself that a trustee can execute a deed by an attorney, and can empower the attorney to receive or join in receiving trust money, and that sect. 2 of the Trustee Act, 1888, will protect a purchaser in paying money to a person so authorized to act": *per* Lindley, L.J. (*Ibid.* at p. 280.)

(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

This sub-section was not contained in the Bill of the Trustee Act, 1888, as introduced by Lord Herschell. The language of sub-s. (1) has been followed, without observing that, with regard

Trustee Act, 1893, Sect. 17.

to a solicitor producing a *deed*, s. 56 of Conv. Act, 1881, had not only made him an agent to receive the money, but had enacted that the production of the deed should be a sufficient authority for the payment; whereby the production of the receipt given by the principal is made equivalent to a receipt given by the agent. It follows that, upon a strict construction, the receipt must also be signed by the person producing the policy of assurance. This remark applies to bankers and to solicitors producing policies of assurance not under seal. With regard to policies, the principal assurance offices differ in their practice; some affixing the company's seal to policies, others granting policies only under the hand of certain officials.

In this sub-section also the word *only* seems to be emphatic.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

See *Wyman* v. *Paterson*, 1900, A. C. 271.

(4.) This section applies only where the money or valuable consideration or property is received after the twenty-fourth day of December one thousand eight hundred and eighty-eight.

(5.) Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Sect. 18. Power to insure building.

18.—(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts,

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without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This section replaces s. 7 of the T. A. 1888. It empowers trustees to insure settled heirlooms against fire, but not against burglary. (*Re Earl of Egmont's Trusts, Lefroy* v. *Earl of Egmont*, 1908, 1 Ch. 821.)

Where the premiums paid on keeping up a policy of insurance on a house and settled chattels are paid out of income, the money paid on the house policy must be applied in rebuilding the house, and the money paid in respect of the chattels must be paid to the tenant for life, provided that he was not bound to insure. (*Re Quicke's Trusts, Poltimore* v. *Quicke*, 1908, 1 Ch. 887; see *ante*, p. 279.)

In *Fry* v. *F.*, 27 Beav. 144, it was held that executors were not personally liable for having omitted to perform a covenant to insure on the part of their testator; but it seems to be implied that if they had performed the covenant, they would have been allowed the amount. Before the Trustee Act, 1888, s. 7, where there was a tenant for life *sui juris*, an executor or a trustee could not safely have applied income in effecting insurance, without the assent of the tenant for life.

Sect. 19. Power of trustees of renewable leaseholds to renew and raise money for the purpose.

19.—(1.) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as

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are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

This section replaces ss. 10 and 11 of the T. A. 1888.

It is conceived that, notwithstanding the proviso at the end of this sub-section, a trustee would be bound, apart from the Act, to renew at the request of any beneficiary who is willing to provide the money for the purpose. As to the old rule of apportionment of the fines where the settlement made no provision therefor, see *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711; *Isaac* v. *Wall*, 6 Ch. 706, and the cases there cited. Whether the lease is renewable under a covenant, or only by custom, makes, for this purpose, no difference. According to this rule, the tenant for life and remainderman contribute in proportion to their *actual* enjoyment of the renewed term, so that their respective contributions cannot be finally ascertained until the death of the tenant for life; and it therefore seems that capital money arising under the S. L. Acts cannot be applied to this purpose, unless such application be authorized by the settlement.

Fines and expenses of renewal, in the absence of directions in the settlement, are now distributable among the beneficiaries in proportion to their enjoyment, to be ascertained by actuarial valuation. (*Re Baring, Jeune* v. *Baring*, 1893, 1 Ch. 61.)

Renewable leaseholds in England are for the most part granted by colleges and ecclesiastical corporations. In the latter case, by 23 & 24 Vict. c. 124, s. 35, the purchase-money, on a purchase of the reversion, may be charged upon the lands. And see also sects. 36, 37, of that Act. In Ireland, the practice of granting renewable leases is very common.

By Lord Cranworth's Act, ss. 8, 9, trustees were authorized to pay the expenses of the renewal out of money held by them upon similar trusts, or to raise the money by mortgage. These sections are repealed by S. L. Act, 1882, s. 64, and their provisions were not re-enacted until the passing of the Trustee Act, 1888, ss. 10, 11.

See further, as to renewable leaseholds, Lewin on Trusts, 9th ed. Chap. XV.

(2.) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the

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hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Sects. 10 and 11 of the Trustee Act, 1888, replaced by this section, are practically a re-enactment of sects. 8 and 9 of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which were repealed by sect. 64 of the S. L. Act, 1882.

Sect. 20. Power of trustee to give receipts.

20.—(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act.

This section replaces Conv. Act, 1881, s. 36.

This is an extension of the corresponding provision in Lord Cranworth's Acts, s. 29, which only referred to "money."

All trustees who have not effectually disclaimed or retired ought to join in the receipt, even if they have already conveyed the estate to the co-trustees. (See *Crewe* v. *Dicken*, 4 Ves. 97.) But it has been held in *Nicloson* v. *Wordsworth*, 2 Swanst. 365, that a conveyance may operate as a disclaimer. A purchaser, having paid his money to a third person by direction of the trustees, who, nevertheless, signed the receipt, was protected: *Hope* v. *Liddell*, 21 Beav. 183; and see *Locke* v. *Lomas*, 5 De G. & Sm. 326; *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56. But in ordinary cases such a mode of payment is objectionable.

Money paid into Court under the Lands Clauses Act, 1845,

can be paid out to trustees entitled, without notice to the *cestuis que trustent*. (*Re Thomas*, W. N. 1882, p. 7; 45 L. T. 746.)

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21.—(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

Sect. 21. Power for executors and trustees to compound, &c.

(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

The corresponding enactment in Conv. Act, 1881, commenced with the words, "As regards trustees." Notwithstanding their omission, it would seem, from the language used, that the subsection applies to trustees only.

(4.) This section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of this Act.

Sect. 21 replaces s. 37 of the Conv. Act, 1881, which took the place of s. 30 of Lord Cranworth's Act. For an example of a compromise held to be good under that section, see *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138. In *Re Warren, Weadon* v. *Reading*, W. N. 1884, p. 181, 53 L. J. Ch. 1016, the power of compounding conferred by the corresponding section

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of Lord Cranworth's Act was held to extend to the claims of persons claiming a share as residuary legatees.

With respect to matters outside the scope of this section, executors and trustees seem to remain subject to the former rule, independently of Lord Cranworth's Act, respecting compromises entered into by them; namely, that they might in such matters exercise their discretion, subject to having their action reviewed, and confirmed or disallowed, as the case might require, by the Court, according as it should appear to have been for the benefit or otherwise of the estate. (*Blue* v. *Marshall*, 3 P. Wms. 381.) It has been considered doubtful whether this rule authorizes executors or trustees to enter into a compromise with one of themselves, even though the same should be beneficial to the estate. (See *De Cordova* v. *De C.*, 4 App. C 692.) But in *Re Houghton*, *Hawley* v. *Blake*, 1904, 1 Ch. 622, it was held by Kekewich, J., that this could be done.

It seems that the only question to be considered since the Act, with reference to the conduct of an executor (or trustee), will be, whether he has acted in good faith or not. (*Per* Jessel, M.R., in *Jones* v. *Owens*, 47 L. T. 61, at p. 64.)

It is conceived that an executor cannot, though trustees may, be deprived of the powers given by this section; see note on sub-s. (3), *supra;* but the section of course includes trustees constituted by will as well as by deed. With regard to the use of the word "authorized," it is not clear whether an express authority is needed, or whether the common form, "or the survivors *or survivor* of them, &c., or other the trustees *or trustee* for the time being of these presents," will suffice to give a sole surviving or continuing trustee the powers conferred by this section. But where the above-cited form is used, and it is not desired that a single trustee should have the powers, an express declaration should be inserted to that effect.

Since executors are considered at law as one person, the act of one is the act of all, and a release by one binds the rest; and it has been held that if one executor settles an account, such settlement (if *bonâ fide*) will be good against the other executors, even if they dissent. (*Smith* v. *Everett*, 27 Beav. 446; Williams on Executors, pt. iii. bk. i. ch. 2.) But the rule, as regards co-trustees, is different, and a receipt by one of two trustees, even though he was also an executor, but not acting in that capacity, is not a sufficient discharge. (*Lee* v. *Sankey*, L. R. 15 Eq. 204.) On the same principle it would appear that the powers given to trustees by this section must be exercised by all of them, the words "two or more trustees acting together" being equivalent to "trustees not being fewer than two." In the case of a private trust, a majority of the trustees cannot bind the minority or the trust estate. (*Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121.) In the case of charitable trusts, a majority of the trustees may act in the ordinary administration of the charity; and by the Charitable Trusts Act, 1869, 32 & 33 Vict. c. 110, s. 12, a majority may exercise a power of sale; but the concurrence of all is required for the exercise of other special powers. The

Court has no jurisdiction to control a dissentient trustee in the exercise of a pure discretion, not coupled with a duty. (*Tempest* v. *Ld. Camoys*, 21 Ch. D. 571.)

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Conv. Act, 1881, s. 37, did not apply to administrators.

It was decided in *Abdallah* v. *Rickards*, 4 Times L. R. 622, that this section does not empower executors to compromise questions relating to the validity of the will under which they claim, or the testamentary capacity of the testator. It is surprising that such a question should ever have been raised.

22.—(1.) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

Sect. 22. Powers of two or more trustees.

(2.) This section applies only to trusts constituted after or created by instruments coming into operation after the thirty-first day of December one thousand eight hundred and eighty-one.

This section replaces Conv. Act, 1881, s. 38.

The enactment seems to formulate the previously existing law, and to remove certain doubts that have been entertained. In *Warburton* v. *Sandys*, 14 Sim. 622, it was held that surviving trustees could sell, even where there was an express direction in the will by which the trust was created, that vacancies should be supplied within a specified time, which had expired. "The result of the authorities and of ss. 22 and 37 of the Trustee Act, 1893, is this: Every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being." (*Per* Farwell, J., in *Re Smith, Eastick* v. *Smith*, 1904, 1 Ch. at p. 144.)

As to sales by surviving trustees generally, see Dart's V. & P. Ch. 13, s. 3.

The old rule, that a bare power given to two or more persons by name, and annexed neither to an estate nor to an office, does not survive, applied only to bare powers, and not to a power given to trustees of a will who had the legal estate. (*Re Bacon, Toovey* v. *Turner*, 1907, 1 Ch. 475.) This rule is not altered by this section, which only extends to powers vested in trustees; for it is conceived that something more than the possession of a bare power is needed to constitute a person a trustee.

By Conv. Act, 1882, s. 6, the rule that powers survive on the death of a donee is extended to the case of a disclaimer by a donee. Whether the last-mentioned section allows powers, annexed neither to an estate nor to an office, to continue to be

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exerciseable upon a disclaimer, requires consideration. (See note thereon, p. 192, *ante*.) It is a significant circumstance, that the enactment has not been repealed and included in the present Act.

As to the survivorship of the powers of guardians, see *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103; 2 Wh. & Tu. L. C.

Sect. 23. Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

See note on Conv. Act, 1881, s. 47, p. 139, *ante*.

Sect. 24. Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

This section replaces s. 31 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), which did little more than state the existing law upon the subject: see Lewin on Trusts, 11th ed. p. 302, and *Re Brier, Brier* v. *Evison*, 26 Ch. Div. p. 243, *per* Lord Selborne.

If a trustee has done all that an ordinary prudent man would do to see that an investment has been made, he is not liable for the fraud of a broker who is his co-trustee. (*Shepherd* v. *Harris*, 53 W. R. 570.)

Trustee Act, 1893, Sect. 24.

PART III.

Powers of the Court.

Appointment of New Trustees and Vesting Orders.

Sect. 25. Power of the Court to appoint new trustees.

25.—(1.) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or who is a bankrupt.

The Trustee Act, 1893, is simply a statute consolidating the existing enactments with reference to trustees, and the general terms used in the Act are not intended to confer a jurisdiction which the High Court had not previously enjoyed; consequently, though the Act empowers the Court to appoint a new trustee in the place of a sole surviving trustee who is a lunatic, it does not give the Court jurisdiction in such a case to make a vesting order. (*Re M.*, 1899, 1 Ch. 79.) On the other hand, the Court has held that the Act enables it to do what it declined to do before. (*Re Lees' Settmt.*, 1896, 2 Ch. 508; *Dugmore* v. *Suffield*, W. N. 1896, p. 50; *Re Fitzherbert's Settmt. Trusts*, W. N. 1898, p. 58.)

Sect. 25 (1) is, for the most part, a reproduction of T. A. 1850, s. 32, and T. A. 1852, s. 9. The power to appoint a new trustee in the case of a felon is taken from T. A. 1852, s. 8; and in the case of a bankrupt from B. A. 1883, s. 147.

An application must not be made to the Court under this section, unless there is no person able and willing to appoint new trustees; if there is such a person the Court has no jurisdiction under this section to act against his wishes. (*Re Higginbottom*, 1892, 3 Ch. 132; and see *Re Kensit*, W. N. 1908, p. 235.)

It has been considered expedient to appoint new trustees under the following circumstances:—Where there is difficulty in obtaining administration to a deceased trustee, *Re Matthew's*

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Settmt., 2 W. R. 85, *Davis* v. *Chanter*, 6 W. R. 416; where one of two trustees for sale is an infant, *Re Porter's Trusts*, 4 W. R. 417; but the order must provide that the infant, on attaining majority, may apply to be restored to the trusteeship, *Re Shelmerdine*, 33 L. J. Ch. 474, *Re Brunt*, W. N. 1883, p. 220; where a trustee has gone permanently to reside abroad, *Re Bignold's Settmt. Trusts*, L. R. 7 Ch. 223; where a trustee has become incapable through age and infirmity, *Re Lemann's Trusts*, 22 Ch. D. 633; but in such cases, unless the trustee himself consents, the vesting order must be made in Lunacy as well as in Chancery, *Re Boyce*, 4 De G. J. & S. 205, *Re Phelps*, 53 L. T. 27; where a trustee is bankrupt, and his duties involve dealing with moneys belonging to the trust, *Re Barker's Trusts*, 1 Ch. D. 43, *Re Hopkins, Dowd* v. *Hawtin*, 19 Ch. D. 61 (though the rule is not absolutely rigid, see *Re Bridgman*, 1 Dr. & Sm. 164), or is a liquidating debtor, *Re Adams' Trusts*, 12 Ch. D. 634; where a trustee has permitted his co-trustee to commit a breach of trust, *Ex pte. Reynolds*, 5 Ves. 707; where the donee of the power to appoint new trustees is abroad, *Re Humphry*, 1 Jur. (N. S.) 921; where the trustees have all predeceased the testator, *Re Smirthwaite's Trusts*, L. R. 11 Eq. 251; if it is doubtful whether the power in the settlement applies to the case, *Re Woodgate's Settmt.*, 5 W. R. 448; where a vesting order is requisite, *Re Davies*, 3 Mac. & G. 278; if it is desired to add to the number of trustees when there is no vacancy, *Re Brackenbury*, 10 Eq. 45; *Re Gregson*, 34 Ch. D. 209; where a legal estate is vested in a company which has been dissolved, *Re Bomore Road*, 1906, 1 Ch. 359. *Quære* whether *Re Taylor's Agreement Trusts*, 1904, 2 Ch. 737, is correct.

Under special circumstances, where the estate was very small, to avoid expense the Court has sometimes made an order without previous service on the committee of a lunatic. (*Re McGowan*, 29 Sol. Journ. 25.)

The Court has refused to displace an existing trustee and appoint another under the following circumstances:—On an allegation that the donee of the power was about to appoint corruptly, *Re Hodson's Settmt.*, 9 Ha. 118; on the ground that a trustee is of great age, *ibid.*; on account of temporary absence abroad, *Re Moravian Society*, 26 Beav. 101.

For other cases where it has been held "expedient" to apply to the Court, see Lewin on Trusts, 11th ed. p. 820, and *Re M.*, 1899, 1 Ch. 79.

The Court can under this section appoint the Public Trustee to be a trustee of the will, if the parties so desire. (*Re Kensit*, W. N. 1908, p. 235.)

It is not necessary to keep up the original number of trustees. (*Re Lees' Settmt.*, 1896, 2 Ch. 508; *Re Fowler's Trusts*, W. N. 1886, p. 183; *Re Leon*, 1892, 1 Ch. 348; *Re Price*, W. N. 1894, p. 169; *Dugmore* v. *Suffield*, W. N. 1896, p. 50; *Re Fitzherbert's Settmt. Trusts*, W. N. 1898, p. 58.) But the Court

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will not under s. 25 discharge a trustee without appointing a new trustee in his place, as it is not the practice to re-appoint continuing trustees in the place of themselves and a retiring trustee, though this may be done in an administration action. (*Re Chetwynd's Settmt., Scarisbrick* v. *Nevinson*, 1902, 1 Ch. 692.)

By R. S. C. Ord. 55, r. 13A, an application to the Court for the appointment of a new trustee, with or without a vesting order, may be made by summons. See Ord. 54B, r. 4A, as to how the summons is to be intituled. The Court may upon summons appoint a new trustee in substitution for one who has been convicted of felony (*Re Dawson's Trusts*, 48 W. R. 73), or has become bankrupt. (*Re Betts*, 41 Sol. Journ. 209.)

(2.) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

Sub-sect. (2) reproduces T. A. 1850, s. 36.

(3.) Nothing in this section shall give power to appoint an executor or administrator.

The definition of "trustee" in s. 50 (*post*, p. 432) renders sub-s. (3) necessary. Where an application is made for the appointment of a new trustee of the estate of a deceased person, and there is reason to believe that the duties of the executors as such have not been fulfilled, the Court will direct the application to stand over until evidence is furnished that all the debts and funeral and testamentary expenses have been paid. (*Re Willey*, W. N. 1890, p. 1; see also *Eaton* v. *Daines*, W. N. 1894, p. 32.)

Sect. 26. Vesting orders as to land.

26. In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

Reproduces T. A. 1850, s. 34, and T. A. 1852, s. 8.

Under ss. 25 and 26 (1) a new trustee for debenture-holders can be appointed, and land vested in him, in place of a corporation which was sole trustee and had gone into liquidation. (*Re Hockley Hole and Whateley Collieries and Brickworks, Ltd.*, 42 Sol. Journ. 449.)

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

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(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found; and

Reproduces T. A. 1850, ss. 7—12. Trustee includes mortgagor (*Re Jones' Mortgage Trusts*, W. N. 1888, p. 217), and vendor (*Re Beaufort's Will*, W. N. 1898, p. 148; *Re Ruthven's Trusts*, 1906, 1 I. R. 236; cf. *Re Pagani's Trusts*, 1892, 1 Ch. 236), and a company which has been dissolved. (*Re General Accident Insurance Corporation*, 1904, 1 Ch. 147; *Re Richard Mills & Co., Ltd.*, W. N. 1905, p. 36; *Re Bomore Road*, 1906, 1 Ch. 359.) *Quære* whether *Re Niger Patent Elastic Enamel Co.*, W. N. 1904, p. 99, and *Re Taylor's Agreement Trusts*, 1904, 2 Ch. 737, are correct.

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

Reproduces T. A. 1850, s. 13.

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

Reproduces T. A. 1850, s. 14.

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

Reproduces T. A. 1850, s. 15; see Conv. Act, 1881, s. 30, and notes thereto. The words "no heir or personal representative" do not mean "neither heir nor personal representative." The words "no heir" apply to the case of a trustee of real estate who died before the 1st January, 1882, and the words "or personal representative" apply to the case of a trustee who died after that date.

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required,

by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

See note to (ii.), *supra*. This sub-section reproduces T. A. 1852, s. 2. The twenty-eight days must have elapsed before the petition is presented. (*Re Knox's Trusts*, 1895, 1 Ch. 538.) See *Rowley* v. *Adams*, 14 Bea. 130, as to the deed to be tendered in the case of copyholds, and *Re Mills' Trusts*, 40 Ch. D. 14, as to what constitutes a wilful refusal. See also note to s. 35 (ii.) (*d*), *post*, p. 419.

"Jointly entitled" under s. 26 includes a coparcener. (*Re Greenwood's Trusts*, 27 Ch. D. 359.)

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

The Court will make a vesting order under this section, although the effect may be to reduce the number of trustees. See *Re Lees' Settmt.*, 1896, 2 Ch. 508, and the cases cited in the note to s. 25 (1), *ante*, p. 409.

This section reproduces s. 34 of the T. A. 1850, under which it was held that where one of two trustees was out of the jurisdiction and the other was willing to act, the Court could make an order vesting the whole estate in the continuing trustee and the new trustee without severing the joint tenancy. (*Smith* v.

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Smith, 3 Dr. 72, *Re Marquis of Bute's Will*, John. 15, overruling *Re Watts' Settmt.*, 9 Hare, 106; *Re Plyer's Trust*, *ibid.* 220.)

Where a sole trustee of copyholds dies intestate and without an heir the Court can under s. 26 make an order vesting such copyholds in the person absolutely entitled thereto. (*In re Godfrey's Trusts*, 23 Ch. D. 205.)

Where there is no doubt that existing trustees have been duly appointed, the Court will not re-appoint them with a view to making a vesting order which will not sever the joint tenancy. (*Re Vicat*, 33 Ch. D. 103.)

For a vesting order where one trustee is a lunatic, see s. 135 of the Lunacy Act, 1890, and in case of a criminal lunatic see *Re R.*, 1906, 1 Ch. 730.

Sect. 27. Orders as to contingent rights of unborn persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

This section reproduces s. 16 of the T. A. 1850.

Sect. 28. Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

This section reproduces in part ss. 7 and 8 of the T. A. 1850. Under these sections the Court has vested in the executors of a mortgagee the legal estate in copyholds which had devolved upon his infant heir. (*Re Franklyn's Mortgage*, W. N. 1888, p. 217.)

Sect. 29. Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of

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representative of mortgagee.

the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely,—

(a) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and

(b) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(c) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(e) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

Section 29 reproduces s. 19 of the T. A. 1850. The reference to the heir or devisee of the mortgagee is material in case of copyholds, as these do not pass to the legal personal representative of the mortgagee. (See Copyhold Act, 1894, 57 & 58 Vict. c. 46, s. 88.)

Where a mortgagee has died leaving a will, the validity of which is disputed, the Court will make an order under sub-s. (*e*) vesting the land in the mortgagor on proof that the mortgage debt has been paid. (*Re Cook's Mortgage*, 1895, 1 Ch. 700.)

Sect. 30.

Vesting order consequential on judgment

30. Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the

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for sale or mortgage of land.

land, or entitled to a contingent right therein *as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made*, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person.

The words in italics are repealed by T. A. 1894, s. 1, *post*, p. 435. The section reproduces s. 29 of the T. A. 1850 as extended by s. 1 of the T. A. 1852, which has been held not to be limited to cases of persons under disability. (*Beckett* v. *Sutton*, 19 Ch. D. 646.) As to estates tail, see *In re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549.

Sect. 31.

Vesting order consequential on judgment for specific performance, &c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Section 31 reproduces s. 30 of the T. A. 1850, and s. 7 of the Partition Act, 1868. See *Beckett* v. *Sutton*, 19 Ch. D. 646, and *Caswell* v. *Sheen*, W. N. 1893, p. 187. "Unborn person" will include the heirs of a living person. (*Basnett* v. *Moxon*, 20 Eq.

182.) As to estates tail, see *In re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549.

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The section does not take away the right of the Court to make a vesting order under s. 26 in a case where there would be no defence to an action for specific performance. (*Re Ruthven's Trusts*, 1906, 1 I. R. 236.)

Sect. 32. Effect of vesting order.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed, and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Section 32 reproduces ss. 8—15 and 19 of T. A. 1850, and ss. 1 and 2 of T. A. 1852. As to the meaning of "conveyance," see s. 50, *post*, p. 430.

Where an order is made vesting or appointing a person to convey the estate of an infant tenant in tail in possession, the effect is to bar the estate tail and remainders over. (*Re Montagu, Faber* v. *Montagu*, 1896, 1 Ch. 549.) See S. C. as to form of order.

An order vesting lands subject to a trust in new and continuing trustees will not have the effect of severing the joint tenancy. See *Re Marq. of Bute's Will*, John. 15, and cases cited in note to s. 26, *supra*.

The effect of an order is to vest the property without any further formality. (*Woodfall* v. *Arbuthnot*, L. R. 3 P. & D. 108.)

Sect. 33. Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in

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conformity with the order shall have the same effect as an order under the appropriate provision.

Section 33 replaces T. A. 1850, s. 20. The conveyance should recite the order, and should be expressed to be made by the person appointed to convey and in his own name. See *Hancox* v. *Spittle*, 3 Sm. & G. 478, and *Shepherd* v. *Churchill*, 25 Beav. 21, as to respective merits of a vesting order, and an order under this section. A person appointed to grant a lease cannot give the usual lessor's covenant for quiet enjoyment. (*Cowper* v. *Harmer*, 57 L. J. Ch. 460.) *Secus* if he were committee of a lunatic. (*Re Ray*, 1896, 1 Ch. 468.) For an order appointing a person to convey where a sale in an action had been ordered by the Court, and the plaintiff refused to convey, see *Beale* v. *Bragg*, 1902, 1 I. R. 99.

Sect. 34. Effect of vesting order as to copyhold.

34.—(1.) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2.) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

Section 34 replaces T. A. 1850, s. 28. For the fines payable to the lord see *Paterson* v. *Paterson*, 2 Eq. 31; *Bristow* v. *Booth*, L. R. 5 C. P. 80.

The lord need not appear in Court to consent to an order under the section. (*Ayles* v. *Cox*, 17 Beav. 584.)

Sect. 35. Vesting orders as to stock and choses in action.

35.—(1.) In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

Replaces T. A. 1850, s. 35.

If there is no legal personal representative of a last surviving trustee, no vesting order can be made except on an appointment of trustees by the Court; and if trustees have already

been appointed out of Court, they will not be re-appointed to enable the vesting order to be made. (*Re Cane's Trusts*, 1895, 1 I. R. 172.) But if the case falls within any of the sub-sections of s. 35, the appointment of new trustees outside the Court does not take away the jurisdiction of the Court to make a vesting order. (*Re Kenny's Trusts*, 1906, 1 I. R. 531.) On an appointment of a new trustee the Court will not make a vesting order in respect of any investment which is a breach of trust. (*Re Harrison*, 22 L. J. Ch. 69.)

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

See s. 50 for definition of "stock."

(a) is an infant, or

Replaces T. A. 1852, s. 3. The Court can make an order under this section although the infant is beneficially interested in the stock. (*Gardner* v. *Cowles*, 3 Ch. D. 304; *Re Harwood*, 20 Ch. D. 536; *Re Findlay*, 32 Ch. D. 221, 641; *Re Alice Kemp*, W. N. 1888, p. 138; *Re Barnett's Estate*, *Foster* v. *Barnett*, W. N. 1889, p. 216.)

(b) is out of the jurisdiction of the High Court, or
(c) cannot be found, or

See T. A. 1850, ss. 22 and 25, also *Dugmore* v. *Suffield*, W. N. 1896, p. 50, for an order hereunder. And see note to s. 26 (ii.) (*c*), *ante*, p. 412, for the cases where the question has arisen whether a company which has been dissolved is a trustee not to be found.

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

Compare T. A. 1850, ss. 23, 24 and 25, and see note to T. A. 1893, s. 26 (vi.), *supra*, p. 413. The applicant must be absolutely entitled, consequently one of several trustees, or a life tenant is not sufficient. (*Mackenzie* v. *M.*, 16 Jur. 723, also 5 De G. & Sm. 338.) But persons duly appointed new trustees are absolutely entitled. (*Ex parte Russell*, 1 Sim. N. S.

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404; *Re Ellis's Settmt.*, 24 Beav. 426.) The section applies where a Scotch executor refuses to prove the will in England. (*Re Trubee*, 1892, 3 Ch. 55.)

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

Compare T. A. 1852, ss. 4 and 5.

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(a) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

(2.) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3.) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland

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and all other companies shall obey every order under this section according to its tenor.

(4.) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5.) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6.) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

The proper form of order is to vest in the trustees "the right to call for a transfer of and to transfer" the stock "and to receive the dividends or income thereof," and to direct the trustees to transfer "into their own names." (*Re Gregson*, 1893, 3 Ch. 233; *Re Joliffe's Trusts*, W. N. 1893, p. 84; *Re Price*, W. N. 1894, p. 169; and see Seton, 6th ed., p. 1213.)

In special cases, *e.g.*, where the shares are subject to a liability for calls, the direction to the trustees to transfer into their own names will be omitted (*Re New Zealand Trust and Loan Co.*, 1893, 1 Ch. 403), or where the investment is unauthorized, the order may give the trustees the right to call for a transfer to any purchaser or purchasers. (*Re Peacock*, 14 Ch. Div. 212.)

Sect. 36. Persons entitled to apply for orders.

36.—(1.) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2.) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Section 36 reproduces s. 37 of the T. A. 1850. Under that

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section it was held that the application might be made by a person contingently entitled to the beneficial interest (*Re Sheppard's Trusts*, 4 De G. F. & J. 423), or by a purchaser (*Ayles* v. *Cox*, 17 Bea. 584), or by creditors who have obtained a decree for the administration of the estate of a debtor whose realty has been sold (*Re Wragg*, 1 De G. J. & S. 356), but not by the committee of a lunatic beneficiary. (*Re Bourke*, 2 De G. J. & S. 426.)

For the practice upon applications under the Act, see R. S. C., Ord. 54B, Ord. 55, r. 13A. The usual rule is to require all persons interested to be before the Court, but the judge has a discretionary power to dispense with any beneficiary. See Practice Note, W. N. 1901, p. 85.

Sect. 37. Powers of new trustee appointed by Court. [*This section replaces Conv. Act*, 1881, *s.* 33.]

37. Every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

This is a re-enactment of the concluding part of s. 27 of Lord Cranworth's Act, with the addition, that a new trustee appointed by a Court shall acquire the powers conferred by the instrument creating the trust before the property is vested in him. But though he can apparently exercise, or concur in exercising, a power of sale, it does not follow that he has any power to convey.

It is conceived that powers which are by their nature personal, unless they are expressly annexed to the office of trustee as such, are not within this section. Such are a discretion to give or withhold consent in the case of marriage, or to alter the distribution of a testator's estate. In such cases, even the expression "said trustees" in a will would probably be held to be equivalent only to a repetition of the names of the designated trustees, and would not attach the discretion to the office. See s. 22 and note thereon, *ante*, p. 407.

Sect. 38. Power to charge costs on trust estate.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such

manner and by such persons as to the Court may seem just.

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Section 38 re-enacts s. 51 of the T. A. 1850, with the addition of the words "by such person." Under the earlier Act there was no power to order a trustee respondent to a petition to pay costs. (*Re Primrose*, 23 Bea. 590; *Re Knight's Will*, 26 Ch. Div. 82.) But under s. 38 such an order can be made. (*Re Knox's Trusts*, 1895, 1 Ch. 538; 2 Ch. 483.)

39. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

Sect. 39. Trustees of charities.

Section 39 re-enacts s. 45 of the T. A. 1850. For cases in which orders have been made under the earlier Act, see Seton, 6th ed., p. 1303.

40. Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs

Sect. 40. Orders made upon certain allegations to be conclusive evidence. 53 & 54 Vict. c. 5.

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occasioned by any such order if improperly obtained.

Section 40 re-enacts s. 44 of the T. A. 1850, and s. 140 of the Lunacy Act, 1890.

Sect. 41. Application of vesting order to land out of England.

41. The powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in Her Majesty's dominions except Scotland.

By s. 2 of the T. A. 1894 (*post*, p. 435), the powers given by this section are extended to the High Court in Ireland.

Payment into Court by Trustees.

Sect. 42. Payment into Court by trustees.

42.—(1.) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

Section 42 is a re-enactment of the Trustee Relief Act, 10 & 11 Vict. c. 96, the Trustee Relief Amendment Act, 12 & 13 Vict. c. 74, and s. 32 of the Legacy Duty Act, 36 Geo. 3, c. 52, all of which are repealed by this Act.

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In order to see who may avail themselves of the power given by this section reference must be made to the definition of trustees given in s. 50 (*post*, p. 432). A legacy to an infant may be paid into Court under the section, and will thereupon cease to carry interest. (*Re Salaman, De Pass* v. *Sonnenthal*, 1907, 2 Ch. 46.) A person who has bought an estate subject to a charge cannot pay the amount of the charge into Court (*Re Buckley's Trust*, 17 Beav. 110), nor can a bank with notice of conflicting claims. (*Re Sutton's Trust*, 12 Ch. D. 175.) But such a payment can now be made by a life assurance company under the Life Assurance Companies (Payment into Court) Act, 1896, 59 & 60 Vict. c. 8.

For the cases where a payment into Court by trustees is justifiable, see Lewin on Trusts, 11th ed., p. 420.

The practice upon payment into Court under this section is now prescribed by R. S. C., Ord. 54B, r. 4.

Miscellaneous.

Sect. 43. Power to give judgment in absence of a trustee.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Section 43 reproduces s. 49 of the T. A. 1850. For an order under that section see *Westhead* v. *Sale*, 3 Jur. N. S. 1209; 6 W. R. 52.

Sect. 44. Power to sanction sale of land or minerals separately.

44.—(1.) Where a trustee *or other person* is for the time being authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

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(2.) Any such trustee, *or other person*, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3.) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

The words in italics in s. 44 are added by s. 3 of the Act of 1894, *post*, p. 435. The section replaces 25 & 26 Vict. c. 108, s. 2, which was passed to overcome the difficulty occasioned by the decision in *Buckley* v. *Howell*, 29 Beav. 546. It does not apply to leases (see *Re Newell and Nevill*, 1900, 1 Ch. 90, overruled on another point in *Re Gladstone, G.* v. *G.*, 1900, 2 Ch. 101); "other person" includes mortgagees. (*Re Beaumont's Mortgage Trusts*, 12 Eq. 86; *Re Wilkinson's Mortgaged Estates*, 13 Eq. 634; *Re Hirst's Mortgage*, 45 Ch. D. 263.)

An application to the Court is made by petition: R. S. C., Ord. 54B, rr. 2 and 3. The *cestuis que trust* ought to be made parties to the application (*Re Palmer's Will*, 13 Eq. 408; *Re Hardstaff*, W. N. 1899, p. 256), though service on a remainderman out of the jurisdiction will be dispensed with. (*Re Skinner*, W. N. 1896, p. 68.) A mortgagor must be served with a petition by the mortgagee (*Re Hirst's Mortgage*, 45 Ch. D. 263), but it has been held unnecessary to serve subsequent incumbrancers. (*Re Beaumont's Mortgage Trusts*, 12 Eq. 86.)

For forms of orders and further notes on the practice, see Seton, 6th ed., pp. 1748—1750; Daniel's Ch. Forms, 4th ed., p. 956, No. 2,183; Lewin on Trusts, 11th ed., p. 506.

Sect. 45. Power to make beneficiary indemnify for breach of trust.

45.—(1.) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the twenty-fourth day of December, one

thousand eight hundred and eighty-eight, and is pending at the commencement of this Act.

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This section replaces T. A. 1888, s. 6. Both sections were intended to enlarge the power of the Court as to indemnifying trustees and to give greater relief to trustees. They do not operate to curtail or affect the previously existing rights and remedies of trustees or to alter the law except by giving greater power to the Court. (*Fletcher* v. *Collis*, 1905, 2 Ch. 24.)

A *cestui que trust*, if *sui juris*, who consented to a breach of trust, was, independently of this enactment, liable to indemnify the trustees, who were of course primarily liable, to the extent of his interest. See *Bolton* v. *Curre*, 1895, 1 Ch. 544. And upon this principle, if two trustees concur in a breach of trust, and one subsequently becomes entitled to a share in the trust estate, he stands in no better position than if he had been entitled thereto at the time of the breach; and the whole of his share must be applied in making good the loss, in priority to any demand for contribution against his co-trustee. (*Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.) The Statute of Limitations does not begin to run against a trustee, as to his claim for such contribution, until the claim of the *cestui que trust* has been actually established. (*Robinson* v. *Harkin*, 1896, 2 Ch. 415.)

In *Sawyer* v. *S.*, 28 Ch. D. 595, the Court seems to have stretched the law a good way, in order to protect a married woman, who was privy to a breach of trust, from the reasonable consequences of her misconduct, although she was not restrained from anticipation. In the case of a married woman restrained from anticipation, her income accruing subsequently to the breach of trust could not, previously to this enactment, have been touched. (*Clive* v. *Carew*, 1 J. & H. 199; *Stanley* v. *S.*, 7 Ch. D. 589.) And even since the Act the Court will be slow to remove the restraint on anticipation for the purpose of enabling a married woman to recoup a trustee for a breach of trust committed at her request. (*Bolton* v. *Curre*, 1895, 1 Ch. 544.)

The words, "in writing," apply only to consent, not to instigation or request. (*Griffith* v. *Hughes*, 1892, 3 Ch. 105; and see *Re Somerset, S.* v. *Earl Poulett*, 1894, 1 Ch. at p. 265.) To come within the section it must be shown that the beneficiary knew the facts which constitute the breach of trust. (*Re Somerset, S.* v. *Earl Poulett*, 1894, 1 Ch. 231.)

A trustee who is sued, and pleads the instigation of tenant for life, may have leave to apply in chambers for ascertaining and enforcing his claim to indemnity. (*Re Holt, H.* v. *H.*, 1897, 2 Ch. 525.)

A tenant for life who instigates a mortgage on certain lands, which turns out to be a breach of trust by reason that the trustee did not exercise proper caution, did not instigate the breach of trust, and is not liable. (*Re Somerset, S.* v. *Earl Poulett*, 1894, 1 Ch. 231; *Mara* v. *Brown*, 1895, 2 Ch. 69; reversed on appeal, 1896, 1 Ch. 199, but not on this point.)

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The assignee of an equitable chose in action is subject to all equities to which his assignor was subject; and the equity created by this section comes within the rule. (*Bolton* v. *Curre*, 1895, 1 Ch. 544; *Doering* v. *D.*, 42 Ch. D. 203.)

A defaulting trustee who is also a beneficiary is liable to the extent not only of his original share in the trust fund, but also of other shares purchased by him; and his assignee stands in no better position. (*Ibid.*)

A reversionary interest under a settlement was assigned, on the marriage of the person entitled to it, to the trustees of his marriage settlement. The trustees of the first settlement, at the instigation of beneficiaries under both settlements, committed a breach of trust. It was held, that under the circumstances, they were not entitled to any indemnity out of income accruing under the provisions of the marriage settlement. (*Ricketts* v. *R.*, 64 L. T. 263.) But there is no rule that the Court ought not to exercise its discretion under this section, unless the trustees have been in some way deceived. (*Griffith* v. *Hughes*, 1892, 3 Ch. 105; *Bolton* v. *Curre*, 1895, 1 Ch. 544.)

Sect. 46. Jurisdiction of palatine and county courts.

46. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

For the statutory provisions as to the jurisdiction of the Courts of the Counties Palatine of Lancaster and Durham, see the Chancery of Lancaster Act, 1890, 53 & 54 Vict. c. 23, and the Act therein mentioned, and the Palatine Court of Durham Act, 1889, 52 & 53 Vict. c. 47.

For the jurisdiction of the County Courts, see County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 67 (5).

PART IV.

Miscellaneous and Supplemental.

Sect. 47. Application to trustees under Settled Lands Acts of provisions as to appointment of trustees.

47.—(1.) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

(2.) This section applies and is to have effect with

respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict. c. 41.

This section replaces S. L. A. 1890, s. 17, which is repealed by this Act.

Trustees for purposes of the S. L. Acts, if they were such by reason of a trust for or power of sale, or a power of consenting to a sale, seem to have been always within the provisions of Conv. Act, 1881, s. 31, replaced by s. 10 of the present Act, with regard to the appointment of new trustees. But previously to S. L. Act, 1890, s. 17, there was much ground to doubt whether persons appointed by the settlement to be trustees for purposes of the S. L. Acts, without any trust or power, came within those provisions.

The same remark applies to trustees for the purposes of Conv. Act, 1881, s. 42. If they are such by reason of a power of sale, they come within the above-mentioned provisions. But it seems to be otherwise if, without any power of sale, they are merely appointed for the purposes of s. 42 by the settlement; and the present section contains nothing to alter the law in this respect.

Trustees appointed to exercise the powers of an infant under s. 60 of the S. L. Act, 1882, do not thereby become trustees with a power of sale under s. 42 of the Conv. Act, 1881, so as to entitle them to possession during the minority of the infant. (*Re Helyar*, 1902, 1 Ch. 391.)

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

For the earlier provisions dealing with convict trustees, see 4 & 5 Will. 4, c. 23, s. 25; T. A. 1850, s. 46; T. A. 1852, s. 8.

Trustee Act, 1893, Sect. 49.

Indemnity.

49. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same.

See T. A. 1850, s. 20; T. A. 1852, s. 7.

Sect. 50. Definitions.

50. In this Act, unless the context otherwise requires,—

The expression "bankrupt" includes, in Ireland, insolvent:

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent.

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the Acts for the abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land:

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any

person who may claim right by devolution of title of a similar description:

The expression "instrument" includes Act of Parliament:

This definition does not enlarge the investment clause in a settlement in such a manner as to make investments authorized only by s. 1 of this Act expressly authorized by the settlement. (*Re Tattersall, Topham* v. *Armitage*, 1906, 2 Ch. 399.)

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land:

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee:

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connexion with the expression "into court" include the deposit or transfer of the same in or into court:

The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land:

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not:

The expression "rights" includes estates and interests:

The expression "securities" includes stocks, funds, and shares; and so far as relates to payments into court has the same meaning as in the Court of Chancery (Funds) Act, 1872:

35 & 36 Vict. c. 44.

The expression "stock" includes fully paid-up

Trustee Act, 1893, Sect. 50.

shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein:

See T. A. 1850, s. 2, under which it was held that stock included shares (*Re Angelo*, 5 De G. & Sm. 278), even though not fully paid. (*Re New Zealand Trust and Loan Co.*, 1893, 1 Ch. 403.) And so far as vesting orders are concerned, this would appear to be the effect of the present Act.

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

Where a mortgagor of land by deposit of deeds declares himself a trustee of the legal estate for the mortgagee, he is a trustee within the meaning of the Act, notwithstanding the exception in this definition. (*London and County Banking Co.* v. *Goddard*, 1897, 1 Ch. 642.)

And see note to s. 25 (3), *ante*, p. 411.

Sect. 51. Repeal.

51. The Acts mentioned in the schedule to this Act are hereby repealed except as to Scotland to the extent mentioned in the third column of that schedule.

Sect. 52. Extent of Act.

52. This Act does not extend to Scotland.

Sect. 53. Short title.

53. This Act may be cited as the Trustee Act, 1893.

54. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Trustee Act, 1893, Sect. 54.

Commencement.

SCHEDULE.

Schedule.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3, c. 52 ...	The Legacy Duty Act, 1796 .	Section thirty-two.
9 & 10 Vict. c. 101	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 1 Vict. c. 32	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict. c. 68	An Act for extending to Ireland an Act passed in the last session of Parliament, entitled "An Act for better "securing trust funds, and "for the relief of trustees."	The whole Act.
12 & 13 Vict. c. 74	An Act for the further relief of trustees.	The whole Act.
13 & 14 Vict. c. 60	The Trustee Act, 1850	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four and fifty-five; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
15 & 16 Vict. c. 55	The Trustee Act, 1852	Sections one to five, eight, and nine; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict. c. 82	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty, and thirty-one.
23 & 24 Vict. c. 38	The Law of Property Amendment Act, 1860.	Section nine.

Trustee Act, 1893, Schedule.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
25 & 26 Vict. c. 108	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
26 & 27 Vict. c. 73	An Act to give further facilities to the holders of Indian stock.	Section four.
27 & 28 Vict. c. 114	The Improvement of Land Act, 1864.	Section sixty so far as it relates to trustees; and section sixty-one.
28 & 29 Vict. c. 78	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40	The Partition Act, 1868	Section seven.
33 & 34 Vict. c. 71	The National Debt Act, 1870.	Section twenty-nine.
34 & 35 Vict. c. 27	The Debenture Stock Act, 1871.	The whole Act.
37 & 38 Vict. c. 78	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83	The Local Loans Act, 1875 ...	Sections twenty-one and twenty-seven.
40 & 41 Vict. c. 59	The Colonial Stock Act, 1877.	Section twelve.
43 & 44 Vict. c. 8.	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39	The Conveyancing Act, 1882.	Section five.
46 & 47 Vict. c. 52	The Bankruptcy Act, 1883 ...	Section one hundred and forty-seven.
51 & 52 Vict. c. 59	The Trustee Act, 1888	The whole Act, except sections one and eight.
52 & 53 Vict. c. 32	The Trust Investment Act, 1889.	The whole Act, except sections one and seven.
52 & 53 Vict. c. 47	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5.	The Lunacy Act, 1890	Section one hundred and forty.
53 & 54 Vict. c. 69	The Settled Land Act, 1890.	Section seventeen.
55 & 56 Vict. c. 13	The Conveyancing and Law of Property Act, 1892.	Section six.

THE

TRUSTEE ACT, 1893, AMENDMENT ACT, 1894.

(57 Vict. c. 10.)

An Act to amend the Trustee Act, 1893.

[18th June, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Amendment of 56 & 57 Vict. c. 53, s. 30.

1. In section thirty of the Trustee Act, 1893, the words "as heir, or under the will of a deceased "person, for payment of whose debts the judgment "was given or order made" shall be repealed.

See T. A. 1893, s. 30, *ante*, p. 416.

Sect. 2. Extension to Ireland of 56 & 57 Vict. c. 53, s. 41.

2. The powers conferred on the High Court in England by section forty-one of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

See T. A. 1893, s. 41, *ante*, p. 424.

Sect. 3. Amendment of 56 & 57 Vict. c. 53, s. 44.

3. In section forty-four of the Trustee Act, 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person."

See T. A. 1893, s. 44, *ante*, p. 425.

The Trustee Act, 1893, Amendment Act, 1894, Sect. 4.

Liability of trustee in case of change of character of investment.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law.

This would include the case of a trustee continuing to hold stock of a railway company which has ceased to be a trustee's investment under T. A. 1893, s. 1 (*g*), by failing to pay a dividend of 3 per cent. on its ordinary stock.

Apart from this section, if a security is authorized, trustees are not liable to make good a loss caused by a fall in its value where they have retained it in the honest belief that they are taking the best course for all parties. (*Re Chapman*, *Cocks* v. *Chapman*, 1896, 2 Ch. 763, reversing 1896, 1 Ch. 323, where it had been held that s. 4 is not retrospective, on which point the decision was not reviewed.) The liability of trustees in dealing with authorized securities must proceed upon the footing of wilful default in not calling in the security. (*Rawsthorne* v. *Rowley*, 24 Times L. R. 51; and 1909, 1 Ch. 409, note.) And see as to the earlier law, *Re Medland*, *Eland* v. *Medland*, 41 Ch. D. 476.

The retention of an investment which is not altogether justifiable may be relieved against under s. 3 of the Judicial Trustees Act, 1896 (*post*, p. 439). (*Re Grindey*, *Clews* v. *Grindey*, 1898, 2 Ch. 593.)

Sect. 5. Short title.

5. This Act may be cited as the Trustee Act, 1893, Amendment Act, 1894.

THE JUDICIAL TRUSTEES ACT, 1896.

(59 & 60 Vict. c. 35.)

An Act to provide for the Appointment of Judicial Trustees and otherwise to amend the Law respecting the Administration of Trusts and the Liability of Trustees.

[14th August, 1896.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1.
Power of Court on application to appoint judicial trustee.

1.—(1.) Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

(2.) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

(3.) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the Court is not satisfied of the fitness of a person so nominated, an official of the Court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof.

Jud. Tr. Act, 1896, Sect. 1.

(4.) The Court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof.

(5.) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the Court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

(6.) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the Court by the prescribed persons, and, in any case where the Court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

By r. 2 of the rules under this Act (set out in the Appendix, *post*), an application to the Court to appoint a judicial trustee, if not made in a pending cause or matter, shall be made by originating summons. See r. 3 as to the persons to be served with the summons and r. 4 as to the evidence in support. By r. 5 the Court is authorized to appoint a beneficiary, or the solicitor to the trust or an existing trustee to be judicial trustee, and by r. 6 vesting orders may be made. The rules also contain provisions as to the administration of the trust (rr. 8-13), as to accounts and audit (rr. 14-16), as to remuneration and allowances (rr. 17-19), as to removal and suspension (rr. 20-22), as to resignation and discontinuance (rr. 23, 24), as to special trusts (rr. 25, 26), and various general provisions as to the exercise of the powers of the Court and local jurisdiction.

The Court can, in a proper case, remove the executor and appoint a judicial trustee in his place; but the matter is entirely in the discretion of the Court, and the mere fact that the tenant for life is sole executrix and trustee is not a sufficient ground for an application by a reversioner for the appointment of a judicial trustee. (*Re Ratcliff*, 1898, 2 Ch. 352.)

The Court will not usually appoint a judicial trustee to act with a sole trustee in opposition to the wishes of a majority of the beneficiaries. (*Re Martin*, W. N. 1900, p. 129.) Nor will it appoint a judicial trustee where the tenant for life is ready to

appoint a person to whom no objection can be made. (*Re Chisholm, Legal Reversionary Society* v. *Knight*, 43 Sol. Jo. p. 43.)

Jud. Tr. Act, 1896, Sect. 1.

The audit of the account of a judicial trustee under sub-s. (6) will not exonerate him from liability for an improper investment. See *Hutton* v. *Annan*, 1898, A. C. 289.

If the Court does not appoint the person suggested by the applicant, it need not appoint an official of the Court, it may appoint a third person. (*Douglas* v. *Bolam*, 1900, 2 Ch. 749.)

Sect. 2. Court to exercise jurisdiction.

2. The jurisdiction of the Court under this Act may be exercised by the High Court, and as respects trusts within its jurisdiction by a palatine court, and (subject to the prescribed definition of the jurisdiction) by any county court judge to whom such jurisdiction may be assigned under this Act.

Sect. 3. Jurisdiction of Court in cases of breach of trust.

3.—(1.) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

(2.) This section shall come into operation at the passing of this Act.

The jurisdiction will not be exercised by anticipation. (*Re Tollemache*, 1903, 1 Ch. 457; *S. C.* 955.)

For remarks as to the practice, when a case for relief is intended to be raised, see *Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 583, at p. 587. The Act need not be pleaded by trustees who wish to rely upon it. (*Singlehurst* v. *Tapscott S.S. Co.*, W. N. 1899, p. 133.)

Acting "reasonably," seems here to mean, acting with such a degree of prudence as a person of ordinary intelligence and diligence may reasonably be expected to display in the conduct of his own affairs. See *Re Turner, Barker* v. *Ivimey*, 1897, 1 Ch. 536; *Wynne* v. *Tempest*, W. N. 1897, p. 43. The Court will not put a narrow construction on the section, and it will extend the relief to trustees who have been honestly misled by the terms of an obscure will. (*Re Grindey, Clews* v. *Grindey*, 1898, 2 Ch. 593, 601.) See also *Perrins* v. *Bellamy*, 1899, 1

Jud. Tr. Act, 1896, Sect. 3.

Ch. 797; *Re Ld. de Clifford, de Clifford* v. *Quilter*, 1900, 2 Ch. 707.

But a trustee who does nothing and accepts without enquiry what is done by his co-trustee is not entitled to relief. (*Re Second East Dulwich 745th Starr Bowkett Building Society, Miall* v. *Pearce*, 68 L. J. Ch. 196.) He must act both honestly and reasonably. (*Re Barker, Ravenshaw* v. *Barker*, 77 L. T. 712; 46 W. R. 296.) He will not be relieved from making an improper distribution of the trust fund (*Davis* v. *Hutchings*, 1907, 1 Ch. 356), or a wrongful investment without any advice (*Chapman* v. *Browne*, 1902, 1 Ch. 785, and see *National Trustees, &c.* v. *General Finance Co.*, 1905, A. C. 373; *Waite* v. *Parkinson*, 85 L. T. 456), or when money has been left in the hands of a solicitor who has made away with it (*Williams* v. *Byron*, 18 Times L. R. 172), or when he has not acted as a prudent man would have done. (*Re Dive, Dive* v. *Robuck*, 1909, 1 Ch. 328; *Shaw* v. *Cates*, 1909, 1 Ch. 389.) But a trustee, living in the country, was held to have acted reasonably in employing her London solicitors as agents for the trust, and was relieved from making good loss occasioned to the trust estate by the fraud of the solicitors' clerk. (*Re Smith, Smith* v. *Thompson*, 71 L. J. Ch. 411.)

The requirements of s. 8 of the Trustee Act, 1893, supply a standard by which reasonable conduct is to be judged; but non-compliance therewith is not necessarily a fatal bar to an application for relief. (*Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 583.)

The section applies to the case of an executor who has committed a *devastavit*. (*Re Kay, Mosley* v. *Kay*, 1897, 2 Ch. 518.) See that case and *Re Grindey, Clews* v. *Grindey, Perrins* v. *Bellamy*, and *Re Ld. de Clifford, ubi sup.*, for a statement of the principles by which the Court is guided.

Sect. 4. Rules.

4.—(1.) Rules may be made for carrying into effect this Act, and especially—

(1) for requiring judicial trustees, who are not officials of the Court, to give security for the due application of any trust property under their control:

(2) respecting the safety of the trust property, and the custody thereof:

(3) respecting the remuneration of judicial trustees and for fixing and regulating the fees to be taken under this Act so as to cover the expenses of the administration of this Act, and respecting the payment of such remuneration and fees out of the trust property, and, where the judicial trustee is an official of the Court,

respecting the application of the remuneration and fees payable to him :

(4) for dispensing with formal proof of facts in proper cases :

(5) for facilitating the discharge by the Court of administrative duties under this Act without judicial proceedings and otherwise regulating procedure under this Act and making it simple and inexpensive :

(6) for assigning jurisdiction under this Act to county court judges and defining such jurisdiction :

(7) respecting the suspension or removal of any judicial trustee, and the succession of another person to the office of any judicial trustee who may cease to hold office, and the vesting in such person of any trust property :

(8) respecting the classes of trusts in which officials of the Court are not to be judicial trustees, or are to be so temporarily or conditionally :

(9) respecting the procedure to be followed where the judicial trustee is executor or administrator :

(10) for preventing the employment by judicial trustees of other persons at the expense of the trust, except in cases of strict necessity :

(11) for the filing and auditing of the accounts of any trust of which a judicial trustee has been appointed.

(2.) The rules under this Act may be made by the Lord Chancellor, subject to the consent of the Treasury in matters relating to fees and to salaries and numbers of officers, and to the consent of the authority for making orders under the Solicitors Remuneration Act, 1881, in matters relating to the remuneration of solicitors. The rules shall be laid before Parliament and have the same force as if enacted in this Act, provided that if, within thirty days after such rules have been laid before either House of Parliament during which that House has

44 & 45 Vict. c. 44.

Jud. Tr. Act, 1896. Sect. 4.

sat, the House presents to Her Majesty an address against such rules or any of them, such rules or the rule specified in the address shall thenceforward be of no effect.

See the rules set out in the Appendix, *post*, p. 560.

Sect. 5. Definitions.

5. In this Act—

The expression "official of the Court" means the holder of such paid office in or connected with the Court as may be prescribed.

The expression "prescribed" means prescribed by rules under this Act.

Sect. 6. Short title, extent, and commencement of Act.

6.—(1.) This Act may be cited as the Judicial Trustees Act, 1896.

(2.) This Act shall not extend to any charity, whether subject to or exempted from the Charitable Trusts Acts, 1853 to 1894.

(3.) This Act shall not extend to Scotland or Ireland.

(4.) This Act, except as by this Act otherwise provided, shall come into operation on the first day of May, one thousand eight hundred and ninety-seven.

THE

MARRIED WOMEN'S PROPERTY ACT, 1882.

(45 & 46 Vict. c. 75.)

An Act to consolidate and amend the Acts relating to the Property of Married Women.

[18th August, 1882.]

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The following brief historical sketch will be found useful in interpreting the present Act.

The effect of the common law, with regard to the marital right of the husband to and over the wife's personal property, and the rents and profits of her real property, is well summed up in the following passage:—

The marital right, generally.

"By common law, on marriage, the husband became entitled to receive the rents of the wife's real estates during their joint lives, and he became absolutely entitled to all her chattels personal in possession and to her choses in action, as debts by obligation, contract, or otherwise, if he reduced them into possession; or if he did not, as administrator of his wife if he survived her; and he became also entitled to her chattels real, with full power to alien them, though if he died before his wife, without having reduced into possession her choses in action, or without

M. W. P. Act, 1882.

having aliened her chattels real, they would survive to the wife." (1 Wh. & Tu. L C. 7th ed. p. 630.)

Real estate.

As above stated, the husband had a right to the rents and profits of the wife's real estate during the coverture. As to any estate of inheritance of which the wife was seised at the time of the marriage, or which devolved upon the wife during the coverture, the husband and wife were jointly seised in right of the wife for the whole of the estate vested in the wife. That the seisin of the husband was for an estate of inheritance, and not only for life, or the joint lives of himself and the wife, is proved by the fact that, whenever homage was an incident of the tenure of the land, it was due from the husband to the superior lord. Before issue born, the homage was of the husband and wife jointly. (Co. Litt. 66 a.) After issue born, the homage was of the husband alone. (Litt. sect. 90.) If the wife died before homage done, no homage was due from the husband as tenant by the curtesy, that estate being only a life estate, and homage being incident only to estates of inheritance. (*Ibid.*)

So, also, as regards an estate of inheritance in a manor vested in a married woman, the husband and wife were jointly seised in right of the wife; and the homage of the tenants of the manor was due to them both jointly, until issue born of the marriage; but after issue born, to the husband alone. (Co. Litt. 67 a.)

The language of Littleton and Lord Coke shows that by "issue" they meant such issue as would qualify the husband to take an estate by the curtesy upon the death of the wife; that is to say, issue which might by possibility succeed to the estate of inheritance in question. For example, the birth of a daughter would not suffice if the estate was an estate in tail male.

Equitable estates.

The tenure, or relation subsisting between lord and tenant, could not be affected by the tenant creating a trust: by which the lord could not be bound, and of which he was under no obligation to take any notice. The remarks above made as to homage, which is a strict legal incident of tenure, have therefore no bearing upon equitable estates. But so far as equitable estates are to be regarded as property, or as conferring proprietary rights, the marital right of the husband was in general extended to them by courts of equity, in the same manner as it would have been extended to them by courts of law if they had been legal estates.

Separate use.

The devices of the conveyancers (as has often happened in the history of English law) by a long time anticipated the tardy action of the legislature, and effected in practice, by introducing a declaration of trust in favour of the married woman for her separate use, all, or nearly all, that the M. W. P. Act, 1882, has attempted. This gave to the married woman both the present enjoyment of the property, and, if the separate use extended beyond her life, the power to dispose of it. (For an example of a married woman entitled in fee simple to her separate use,

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see *Cooper* v. *Macdonald*, 7 Ch. D. 288.) But the power of disposition was more commonly, and with greater formality, effected by the creation of an express power. The doctrine of separate use was equally applicable to real and to personal property. The opinion was at first entertained that a separate use could not be created without the intervention of an express trustee (see, as to real estate, 1 P. Wms. 126, and as to personal property, 2 P. Wms. 79); but it was soon decided that, where the intention to create separate use was clear, the husband himself should, if necessary, be held to be a constructive trustee for the wife. (*Bennet* v. *Davis*, 2 P. Wms. 316; since which case the rule has not been questioned.)

Curtesy.

To entitle the husband to be tenant by the curtesy of the wife's lands of inheritance after the death of the wife, the following circumstances are necessary :—

(1) That the wife be seised during the coverture of an estate of inheritance to which issue of the marriage may possibly succeed as heir to the wife (Litt. sects. 35, 52);
(2) That the estate be, or become during the coverture, an interest in possession;
(3) That seisin in deed (less properly styled actual seisin) be obtained during the coverture; and
(4) That issue, capable of succeeding by inheritance as aforesaid, be born alive.

Courts of equity allowed to the husband a right, analogous to curtesy, which may be styled equitable curtesy, in respect of equitable estates having the same nature and *quantum* as legal estates which confer the right (Harg. n. 6, on Co. Litt. 29 a). The phrase equitable estates here includes an equity of redemption (see *Casborne* v. *Scarfe*, 1 Atk. 603); also trust money held upon trust for investment in land. (See *Sweetapple* v. *Bindon*, 2 Vern. 536.) The doubt expressed in the last-cited case, whether curtesy should be allowed if the trust arose under marriage articles, is disposed of by *Cunningham* v. *Moody*, 1 Ves. sen. 174.

If the wife is entitled to her separate use not only as regards the income, but also as regards the *corpus*, this does not prevent the right of the husband from attaching, though it will be defeated by the wife's alienation, whether *inter vivos* or by will. (*Cooper* v. *Macdonald*, 7 Ch. D. 288; overruling *Moore* v. *Webster*, L. R. 3 Eq. 267.) An express declaration contained in the settlement that the husband "shall not be tenant by the curtesy," will exclude his right altogether; even though the legal estate be in the wife. (*Bennet* v. *Davis*, 2 P. Wms. 316.)

The M. W. P. Act, 1882, does not affect the husband's right to curtesy, further than such right was affected by a separate use before the Act. (*Hope* v. *H.*, 1892, 2 Ch. 336.)

Wife's equity to a settlement.

Courts of equity would not actively interfere with the husband in the prosecution of his above-stated legal rights; but in cases where, by reason of the existence of a trust, or for any similar

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reason, it was necessary to have recourse to equity, the Court would give him no assistance, except upon condition of his making an adequate settlement in favour of his wife, through whom the right accrued, and her children, if any. This equitable right of the wife is commonly called her equity to a settlement. Her claim under this equity had priority over the claims of the husband's creditors. (*Lady Elibank* v. *Montolieu*, 5 Ves. 737; and see notes thereon, in 1 Wh. & Tu. L. C.)

The wife had an absolute right to waive her equity to a settlement, and her waiver was an absolute bar to all claims on the part of her children.

But if she died, after a decree made, and before the execution of a settlement, without having done anything to waive her equity, the right to a settlement survived to her children. (*Murray* v. *Lord Elibank*, 10 Ves. 84; *S. C.* 13 Ves. 1; and see notes thereon, in 1 Wh. & Tu. L. C.)

A trustee or an executor having in his hands personalty belonging to a married woman, was not bound to take any steps to assert her equity to a settlement, but might safely pay or transfer the property to the husband at any time before the filing of a bill to assert her right. (*Per* Lord Eldon, *Murray* v. *Lord Elibank*, 10 Ves. 84, at p. 90.)

The Acts of 1870 and 1874.

The Married Women's Property Act, 1870, did not effect any very extensive alteration of the previous law. Many of its provisions as to deposits in savings banks, Government stocks, policies of assurance, &c., have been adopted, with modifications, into the present Act; but the extent of its interference with the marital right of the husband is almost summed up in the two following provisions:—

(1.) Wages and earnings of a married woman and investments made therewith were to be deemed property settled to her separate use.

(2.) Any woman married after the passing of the Act (9th August, 1870), took for her separate use,—

(a) any personal property to which she became entitled under an intestacy;

(b) any sum of money, not exceeding 200*l.*, to which she became entitled under any deed or will; and

(c) the rents and profits of any real property to which she was entitled by descent.

The Married Women's Property Act (1870) Amendment Act, 1874, 37 & 38 Vict. c. 50, did not deal with the marital right over the wife's property, but with the liability of the husband in respect of the wife's debts, torts, and contracts.

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The Married Women's Property Act, 1882, consolidates and very greatly extends the provisions of the Married Women's Property Act, 1870 and the Married Women's Property Act (1870) Amendment Act, 1874; which Acts are repealed as from

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the 1st January, 1883, the date of its commencement. The Act of 1882 was subsequently amended by the Married Women's Property Act, 1884, the Married Women's Property Act, 1893, and the Married Women's Property Act, 1907. The following is a brief summary * of the chief provisions of the Acts.

As regards Women married before the Act of 1882:

All property their title to which accrues after the Act, including earnings, is to be their separate property. (Sect. 5.)

All deposits in savings banks, annuities, public funds, and shares in companies and societies, which at the commencement of the Act are standing in a married woman's name, solely (s. 6), are to be taken to be her separate property. This rule is, by s. 8, extended to property standing in her name jointly with any other person except her husband, so far as relates to her interest therein.

As regards Women married after the Act:

All property belonging to a woman at her marriage, or afterwards acquired by or devolving upon her, including earnings, is to be held by her as a *feme sole* (s. 2), subject to the provisions contained in her settlement, if any (s. 19).

As regards all Women married either before or after the Act:

A married woman may acquire, hold, and dispose of any property as if she were a *feme sole*, without the intervention of trustees. (Sect. 1, sub-s. (1).) She may enter into contracts under s. 1, sub-s. (2), under which it was held by the Courts that it was a condition precedent to their validity, that she should have had some separate estate at the date of the contract; but now, by the Married Women's Property Act, 1893, s. 1, her contracts bind all her separate property, whether present or future, whether she has or has not any such property at the date of the contract. She may accept a trusteeship or the office of executor (s. 24), and make insurances (see *post*), and may sue and be sued without joinder of her husband (s. 1, sub-s. (2)), and may be made bankrupt if trading apart from her husband (s. 1, sub-s. (5)). She may lend money to her husband and prove in his bankruptcy, but not in competition with other creditors for valuable consideration. (Sect. 3.) She has power to make a will (s. 1, sub-s. (1)), and if she thereby exercises a general power of appointment, the property thereby appointed becomes liable for her debts (s. 4); and by the Married Women's Property Act, 1893, s. 3, her will is construed, under the Wills Act, s. 24, to take effect with reference to all her property, as though it had been executed immediately before her death; and whether she had or had not any separate property at the time of making it; and it does not require to be re-executed after the death of

* References to sections, in the absence of special notice, refer to the Act of 1882.

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her husband. She can make investments in her own name, which will be her separate property unless and until the contrary is shown (s. 7); but no company is compelled, contrary to its constitution, to place her on the register in respect of shares to which a liability is attached. (*Ibid.*) The same remarks apply to her interest in joint investments not made jointly with her husband (s. 8); and she may transfer, or join in a transfer, without her husband (s. 9). She may insure her life or that of her husband, and the policy may be expressed to be for the benefit of her husband or children, or any of them. (Sect. 11.) Such policy, if so expressed, will not form part of her estate, and trustees of the policy moneys may be appointed. (*Ibid.*) A husband may effect an insurance in like manner. (*Ibid.*)

A married woman may take civil proceedings against all persons, and may take criminal proceedings against all persons, except her husband while she is living with him, for the protection of her property. (Sect. 12.) A husband may take criminal, but not civil, proceedings against his wife. (Sect. 16.) Now, by the Married Women's Property Act, 1884, s. 1, in all authorized criminal proceedings, by husband or wife, each is a competent witness, and, except when defendant, is compellable to give evidence.

A married woman remains liable for ante-nuptial debts and contracts (s. 13); and her husband is liable to the extent of any property acquired by him through his wife (s. 14). But in the case of persons married before the Act, such liability is not to be increased or diminished. A husband and wife may be jointly sued. (Sect. 15.) A married woman is liable to the parish for the maintenance of her husband (s. 20) and children. (Sect. 21.)

Investments fraudulently made by a married woman, as against either her husband or creditors, are provided against (s. 10); and premiums fraudulently paid on policies are to be refunded to creditors out of the policy money (s. 11).

Questions of title between husband and wife as to property are to be decided by summons, or otherwise in a summary way, subject to appeal. The County Court has jurisdiction, subject to a right of removal if the amount in litigation exceeds the prescribed limit. (Sect. 17.)

Existing settlements are preserved, and future settlements may be made, including a restraint on anticipation; but any future settlement of a woman's property will be valid against her creditors only so far as a settlement of a man's property would be valid against his creditors. (Sect. 19.)

Sect. 1. Married woman to be capable of holding property and of

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her

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separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

contracting as a feme sole.

This section, as modified by the M. W. P. Act, 1893, s. 1, p. 484, *post*, defines the rights and powers of a married woman over property which is made her separate estate by the Act. The question what property is so made her separate estate, is dealt with, as to women married after the Act, by sect. 2, and as to women married before the Act, by sect. 5, *post*.

A woman married after the Act, and, so far as regards property accruing to her after the Act, a woman married before the Act, can dispose under this section of property by a will executed during coverture. The will of a married woman made during coverture before the Act, is able without re-execution to pass property which by this Act is made her separate estate. (*Re Bowen, James* v. *J.*, 1892, 2 Ch. 291.) But before the M. W. P. Act, 1893, s. 3, the will of a married woman made during coverture was ineffectual to dispose of property acquired after the determination of the coverture, unless re-executed. (*Re Price, Stafford* v. *S.*, 28 Ch. D. 709.)

If the married woman does not exercise the powers of alienation conferred by the Act, the husband's marital right in respect of her personal estate remains unaffected. (*Re Lambert, Stanton* v. *Lambert*, 39 Ch. D. 626.) The executor of her will, as to any such property undisposed of, is a trustee of such property for the husband. But, nevertheless, general probate should now be granted of the will of a married woman, and the probate will not be restricted "to such property as the testatrix had a right to dispose of." (*Re Price*, 12 P. D. 137.) A husband who claims probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of. (*Re Atkinson, Waller* v. *Atkinson*, 1898, 1 Ch. 637, affd. 1899, 2 Ch. 1; *Re Nathan, Herring* v. *Spyer*, 51 Sol. Journ. 428.) And the will of a married woman dealing only with realty, but appointing executors, is entitled to probate, if part of the estate is personalty coming within this Act. (*Re Cubbon*, 11 P. D. 169.) A husband is entitled to curtesy in his deceased wife's undisposed of realty, being her separate estate under the Act. (*Hope* v. *H.*, 1892, 2 Ch. 336.)

If a woman dying after the Act attempts by her will to deal with property as to which (having been married before the Act) she has no power of disposition, and probate has been granted of her will, her executor is a trustee for the husband, and can be compelled in an action by the husband to transfer the assets to him. (*Smart* v. *Tranter*, 43 Ch. D. 587.)

In a case where an executor propounded the will of a married woman, to which the husband had not assented, the Probate Division, on proof of separate estate, granted probate, but declined to adjudicate on the ultimate destination of the property. (*Harding* v. *Sutton*, 59 L. T. 838.)

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This sub-section refers only to property which is made separate property by the Act. With regard to separate estate by contract, a will made under coverture in exercise of a power, needs to be republished on the death of the husband. (*Re Cuno, Mansfield* v. *M.*, 43 Ch. D. 12.) This rule seems now to be altered by the M. W. P. Act, 1893, s. 3, p. 486, *post*. As to property coming within the present Act, the will would not, even without the Act of 1893, have required republication. (*Re Bowen, James* v. *J.*, 1892, 2 Ch. 291.)

Upon the soundest reasoning it would seem that the old rule of construction, that under a gift by will to a man and his wife together with other persons, the man and wife take one share only, has not been altered by the Act. (*Re Jupp, J.* v. *Buckwell*, 39 Ch. D. 148; but see the contrary opinion expressed by Chitty, J., in *Re March, Mander* v. *Harris*, 24 Ch. D. 222; where his judgment was overruled by the Court of Appeal, 27 Ch. D. 166, upon other grounds.) The question being one of intention, it is impossible to lay down any rule which shall be independent of the length of the judge's foot. (See *Re Dixon, Byram* v. *Tull*, 42 Ch. D. 306.)

This Act does not enable a married woman to make a gift by will for the building of a church, by virtue of 43 Geo. 3, c. 108, s. 1, the disability imposed by the proviso at the end of that enactment continuing still in force. (*Re Smith, Clements* v. *Ward*, 35 Ch. D. 589.)

A married woman may now, by bargain and sale, acquire the legal title to chattels belonging to her husband; and a receipt acknowledging payment of the purchase-money does not need to be registered under the Bills of Sale Act, 1878. (*Ramsay* v. *Margrett*, 1894, 2 Q. B. 18.) Since she has the legal title, the fact that the chattels are in a house jointly occupied by the husband and wife, does not now indicate that the possession is in the husband. (*Ibid.*) And where goods the separate property of the wife were stolen from the house of her husband, where she was residing, the indictment must lay the goods as the property of the wife, and not of the husband. (*Rex* v. *Murray*, 1906, 2 K. B. 385.)

A married woman may enlarge a base fee, being her separate property under the Act, without the assent of her husband or acknowledgment. (*Re Drummond and Davie*, 1891, 1 Ch. 524.) And under the Married Women's Property Act, 1907, s. 3 (*post*, p. 489), she may be sole protector of a settlement.

A woman married after the Act, having a life interest in personalty, with a general power of appointment, and in default, to herself absolutely, can now, on releasing the power, dispose of the fund. (*Re Davenport, Turner* v. *King*, 1895, 1 Ch. 361.)

It has been held in Ireland that general probate should be granted of a will made in exercise of a power only, and not otherwise purporting to dispose of property. (*Re Ievers*, 13 L. R. Ir. 1.)

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(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

This sub-section does not render a married woman liable to maintain her father under the Poor Law Acts, though she is liable to maintain her husband under s. 20 and her children and grandchildren under s. 21. (*Pontypool Union* v. *Buck*, 1906, 2 K. B. 896.) A woman married before the Act, if a petitioner under the Settled Estates Act, 1877, with regard to property not accruing subsequently to the Act, must of course still be examined separately, as provided by sect. 50 of the Act of 1877. (*Re Harris' S. E.*, 28 Ch. D. 171.) It is otherwise if the woman was married after the Act; or, if she was married before the Act, provided that the property accrues to her after the Act. (*Riddell* v. *Errington*, 26 Ch. D. 220; *Re Batt's S. E.*, 1897, 2 Ch. 65; and see S. L. A. 1882, s. 32, note, *ante*, p. 286.)

It is still the rule that a married woman cannot act as next friend or guardian *ad litem*. (*Re D. of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465.)

The Act is not retrospective as regards engagements by married women. (*Davies* v. *Stanford*, 61 L. T. 234.)

A married woman receiving from executors shares liable to calls, is bound to indemnify the executors against the calls. (*Whittaker* v. *Kershaw*, 45 Ch. D. 320.)

A married woman may now sue for a tort which was committed before the Act without joining her husband. (*Weldon* v. *Winslow*, 13 Q. B. D. 784, which overruled *Weldon* v. *Rivière*, W. N. 1884, p. 154, 53 L. J. Q. B. 448; see also *James* v. *Barraud*, 31 W. R. 786.) She can also sue alone for a trespass committed in a house purchased by her out of her separate earnings since the Married Women's Property Act of 1870. (*Weldon* v. *De Bathe*, 14 Q. B. D. 339.) And she may sue without a next friend and without giving security for costs (*Threlfall* v. *Wilson*, 8 P. D. 18; *Re Isaac, Jacob* v. *Isaac*, 30 Ch. D. 418); even though the cause of action arose before the Act. (*Severance* v. *Civil Service Supply Association*, 48 L. T. 485.) But if she sues by a next friend, security for costs may

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be required. (*Re Thompson, Stevens* v. *Thompson*, 38 Ch. D. 317.) It is conceived that a husband could not commit a trespass by entering his wife's house, unless judicially separated from her. But under special circumstances, a wife may be entitled to an injunction to restrain him from entering. (*Symonds* v. *Hallett*, 24 Ch. D. 346.) By s. 12 a wife may sue her husband for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. *Qu.* whether an action for libel can be maintained by a wife against her husband. (*Reg.* v. *Lord Mayor of London*, 16 Q. B. D., p. 777.)

Since a married woman can sue as a *feme sole*, her undertaking in damages must be accepted on granting an interlocutory injunction on her motion. (*Re Prynne*, W. N. 1885, p. 144, 53 L. T. 455; *Pike* v. *Cave*, W. N. 1893, p. 91, 62 L. J. Ch. 937.)

In *Scott* v. *Morley*, 20 Q. B. D. 120, the Court of Appeal said that a judgment under this sub-section against a married woman should be as follows :—

> "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless, by reason of sect. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

The rule laid down in *Scott* v. *Morley*, *supra*, applies to orders for payment of costs. (*Galmoye* v. *Cowan*, 58 L. J. Ch. 769.) Nevertheless, if in the course of an action against a married woman, some costs are given against her, and some against the plaintiff, costs to which she is entitled may be set off against costs to which she is liable. (*Pelton* v. *Harrison*, No. 2, 1892, 1 Q. B. 118.)

The order in *Scott* v. *Morley* is the proper form of order where a married woman is compelled to make good a loss occasioned by *devastavit* or breach of trust, but not where she is directed to pay into Court trust moneys which she admits having received. (*Re Turnbull, T.* v. *Nicholas*, 1900, 1 Ch. 180.) In the latter case, the order should be in the common form, and if she fails to comply with it, the Court may make an order for attachment against her. (*S. C.*)

Where the action is against the husband and wife jointly, in respect of a debt contracted by the married woman before marriage, see *Downe* v. *Fletcher*, 21 Q. B. D. 11, where the same form of judgment as in *Scott* v. *Morley*, *supra*, was approved of by a Divisional Court in the Queen's Bench Division. But in a subsequent case, before a like Divisional Court, it was held that the plaintiff was entitled to personal judgment against the wife. (*Robinson* v. *Lynes*, 1894, 2 Q. B. 577.)

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Unless at the time of the judgment she has separate property capable of being bound by it, she is not liable to be committed to prison under the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 5, for non-payment of the debt, though it be shown that, since the judgment, she has been in receipt of income as to which she is restrained. (*Draycott* v. *Harrison*, 17 Q. B. D. 147.)

For the cases where a married woman can be made a bankrupt see sub-s. (5) and notes thereon, *post*, p. 457.

A judgment recovered against a married woman does not, upon the death of her husband, render her personally liable to pay the judgment debt, so as to entitle the judgment creditor to issue a bankruptcy notice against her upon the judgment. (*Re Hewett*, 1895, 1 Q. B. 328.)

Rents, as to which the married woman is restrained from anticipation, accruing due after the date of the order for payment, but before the issue of the writ of sequestration, cannot be seized under the writ. (*Re Lumley*, 1894, 3 Ch. 135; *Lowry* v. *Dereham*, 1895, 2 Ir. R. 123.) And the same doctrine applies to all kinds of process whatsoever. (*Hood-Barrs* v. *Cathcart*, 1894, 2 Q. B. 559; *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Bolitho* v. *Gidley*, 1905, A. C. 98.) This doctrine does not apply to income which accrued due before the judgment, but remains in the hands of the trustees. (*Hood-Barrs* v. *Heriot*, 1896, A. C. 174.)

Trustees entitled to costs against a married woman may retain them out of income, as to which she is restrained from anticipation, accruing between the institution of proceedings and the order for payment. (*Cox* v. *Bennett*, 1891, 1 Ch. 617.)

All married women became discovert within the meaning of 21 Jac. 1, c. 16, s. 7, immediately on the passing of the present Act; and their right of action then accrued for torts committed before the Act. (*Lowe* v. *Fox*, 15 Q. B. D. 667. The decision on *S. C.* in 12 App. Cas. 206 was on another point. See also *Weldon* v. *Neal*, W. N. 1884, p. 153; 32 W. R. 828.) It seems to follow that now, as against married women, the statute begins to run as against a *feme sole*.

The Act does not deprive a husband of any remedy which he previously had against his wife's separate estate; and therefore he may still bring an action to charge her separate estate for money lent by him to her after their marriage. (*Butler* v. *B.*, 16 Q. B. D. 374.)

The Act has not abolished the husband's liability for his wife's torts committed subsequently to the marriage; and the person aggrieved may at his option either sue the husband and wife jointly or the wife alone (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177), unless the tort is a fraud directly connected with a contract with the wife (see *Earle* v. *Kingscote*, 1900, 1 Ch. 203, affd. 1900, 2 Ch. 585). If both are sued for a libel published by the wife, the husband cannot plead a payment into Court in satisfaction of the claim while the wife pleads in denial of

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liability. (*Beaumont* v. *Kaye*, 1904, 1 K. B. 292.) A husband cannot sue alone for a tort to his wife's separate property. (*Ruston* v. *Sherras*, 44 Sol. Jo. 11.)

The expression "need not be joined" in sub-s. (2) does not mean that whenever a plaintiff is suing a married woman in contract or in tort he "shall not" join the husband with her, but only that the joinder which was formerly necessary is now unnecessary if the plaintiff is seeking to obtain satisfaction out of the wife's separate estate alone. (*Earle* v. *Kingscote*, 1900, 2 Ch. 585.)

Where an action for the price of goods is brought against the husband and wife alternatively, and the plaintiffs sign judgment under Ord. XIV. against the wife, who has separate property, this amounts to a conclusive election by the creditors to rely on the wife's liability, and they cannot afterwards insist on the liability of the husband. (*Morel* v. *Earl of Westmoreland*, 1903, 1 K. B. 64, 1904, A. C. 11; *French* v. *Howie*, 1905, 2 K. B. 580, revd. 1906, 2 K. B. 674.)

Costs may be ordered to be paid by a married woman out of separate property which she has acquired since the cause of action arose; but the Court of Appeal will not interfere with the discretion of the Court below as to whether such after-acquired property shall be rendered liable. (*Neville* v. *Baker*, 4 Times L. R. 674.) A married woman may be ordered to give security for costs of an appeal. (*Weldhen* v. *Scattergood*, W. N. 1887, p. 69; *Whittaker* v. *Kershaw*, 44 Ch. D. 296.). For the cases where costs may be ordered to be paid out of property subject to a restraint on anticipation, see M. W. P. A. 1893, s. 2, *post*, p. 485.

Where an action by a married woman has been dismissed with costs, to be paid out of her separate property, the Court will appoint a receiver of such property on the application of the defendants before their costs have been taxed. (*Cummins* v. *Perkins*, 1899, 1 Ch. 16.)

Judgment may now be given, under R. S. C. Ord. XVI. r. 52, against a married woman, when brought in as a third party, charging her separate estate, even in respect of a liability incurred before the Act. (*Gloucester Bkg. Co.* v. *Phillipps*, 12 Q. B. D. 533.)

In a case where the cause of action accrued prior to the Act, judgment was entered against a married woman as sole defendant, though the writ did not claim to charge her separate estate. (*Brown* v. *Morgan*, 12 L. R. Ir. 122.) A husband and wife can contract, without the intervention of a trustee, to live apart, in consideration of an undertaking not to take legal proceedings one against the other. (*McGregor* v. *McG.*, 21 Q. B. D. 424.) Since the M. W. P. Act, 1882, when a married woman is administratrix, her husband does not join in the administration bond. (*Re Ayres*, 8 P. D. 168.)

A married woman who gives notice, under the Poor Rate, &c., Act, 1869, s. 4, that she elects to be rated in respect of houses belonging to her, whether occupied or not, and claims the

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consequent abatement, does not enter into a contract with the overseers under this Act, but is liable in the same way as if she had not been a married woman. (*Re Allen*, 1894, 2 Q. B. 924.)

A woman, married before the Act, entered into a covenant, which was void by reason of her coverture, to be performed after her husband's death, and in consideration thereof she received an annuity during her lifetime. It was held, after his death, that she was not bound to perform the covenant. (*Harle* v. *Jarman*, 1895, 2 Ch. 419.) And no case of election can be raised against her. (*Ibid.*)

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.*

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.*

Sub-sects. (3) and (4) were repealed by the M. W. P. Act, 1893, s. 4, and are replaced by s. 1 of that Act, p. 484, *post*.

The law contained in these sub-sections applies to all contracts entered into by married women between the commencement of the M. W. P. Act, 1882, and the passing of the M. W. P. Act, 1893; that is, from 1st January, 1883, to 5th December, 1893. (See *Softlaw* v. *Welch*, 1899, 2 Q. B. 419.)

Before the enactment of the repealed sub-sections a married woman's contract, made so as to bind her separate estate, bound only so much of her separate estate as she was entitled to, without restraint on anticipation, at the date of the contract, and retained at the date of the judgment, and did not bind either property acquired after the contract, or property as to which she was restrained from anticipation at the date of the contract. (*Pike* v. *Fitzgibbon*, 17 Ch. D. 454.)

The repealed sub-sections did not include contracts entered into by a married woman before the Act. (*Conolan* v. *Leyland*, 27 Ch. D. 632.) And such a contract did not bind property acquired after the Act. (*Turnbull* v. *Forman*, 15 Q. B. D. 234.) In *Bursill* v. *Tanner*, 13 Q. B. D. 691, the view seems to have been entertained that these sub-sections were retrospective. This view was questioned by the Court of Appeal in *Turnbull* v. *Forman*, *supra*, and appears to be very doubtful.

Where judgment is recovered in an action against a widow upon a contract entered into by her during coverture after the commencement of the Act of 1882, and before the passing of the Act of 1893, the plaintiff is not entitled to a judgment in the

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ordinary form as though the defendant were a *feme sole*. He can only sign a judgment in the form settled in *Scott* v. *Morley*, 20 Q. B. D. 120, with such verbal alterations as are necessary to adapt that form to a judgment against a widow. (*Softlaw* v. *Welch*, 1899, 2 Q. B. 419.)

If a married woman who is restrained from anticipation enters into a contract after the passing of the Act of 1893, and is then divorced and judgment is subsequently obtained against her, income accruing after the divorce cannot be attached. (*Barnett* v. *Howard*, 1900, 2 Q. B. 784.) And the rule is the same where the husband dies after the contract is entered into. (*Brown* v. *Dimbleby*, 1904, 1 K. B. 28.)

Damages recovered by a married woman in an action for malicious prosecution, may be attached by garnishee order under R. S. C. Ord. XLV. r. 1. (*Holtby* v. *Hodgson*, 24 Ch. D. 103.)

The exercise by will of a general power of appointment by a married woman dying since the Act does not make the appointed property liable for her contracts entered into before the Act. (*Re Roper, R.* v. *Doncaster*, 39 Ch. D. 482.)

The doubt which seems to have been expressed by the learned judge in that case, that the appointment does not make the property liable for her contracts entered into subsequently to the Act, upon the ground that it does not make the property her "separate property," seems difficult to reconcile with s. 4, p. 460, *post*.

It was decided, under the repealed sub-sections, that a married woman could not be made liable upon a contract, unless she had some separate property at the date of the contract; and that the onus of proving this fact rested upon plaintiff. (*Re Shakespear, Deakin* v. *Lakin*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661; *Everett* v. *Paxton*, 65 L. T. 383; *Braunstein* v. *Lewis*, 65 L. T. 449.) But it seems that if she was entitled to a reversionary interest, that would suffice. (*Loibl* v. *Fraser*, 9 Times L. R. 534.) The law is altered in this respect, with regard to contracts entered into after 5th December, 1893, by the M. W. P. Act, 1893, s. 1, p. 484, *post*. (See *Paquin* v. *Beauclerk*, 1906, A. C. 163, *per* Lord Macnaghten.)

The above-stated doctrine also applied, when the woman had separate estate, but only of such a kind that its nature rebutted an intention to contract with regard to it. (*Leake* v. *Driffield*, 24 Q. B. D. 98; *Harrison* v. *H.*, 13 P. D. 180.) The decisions on this point are somewhat capricious, and the principle upon which they rest is not clear. In *Bonner & Co.* v. *Lyon*, 38 W. R. 541, it seems to have been thought that the question of intention was not relevant.

Property as to which the married woman was restrained from anticipation, did not, by the death of the husband, become liable under her contracts made during coverture. (*Pelton* v. *Harrison*, No. 1, 1891, 2 Q. B. 422; and see *Softlaw* v. *Welch*, 1899, 2 Q. B. 419.) The rule seems not to be altered by the

M. W. P. Act, 1893, s. 1. But such property will pass to her trustee in bankruptcy upon her becoming discovert. (*Re Wheeler's Settmt., Briggs* v. *Ryan*, 1899, 2 Ch. 717.)

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A direction in the will of a married woman that her debts shall be paid makes all the property she has power to dispose of, including arrears of an annuity which was subject to a restraint on anticipation, assets for payment of all liabilities of her separate estate, including damages for breach of covenant by her executors. (*Sprange* v. *Lee*, 1908, 1 Ch. 424.)

Neither this section, nor s. 19, p. 476, *post*, renders property comprised in a settlement made before the Act liable to a married woman's debts, if it would not have been so liable independently of the Act. (*Beckett* v. *Tasker*, 19 Q. B. D. 7. See also *Myles* v. *Burton*, 14 L. R. Ir. 258.)

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Before this enactment a married woman could not be made a bankrupt under any circumstances, unless she were trading under the custom of London. She cannot now be made a bankrupt, unless she is carrying on a trade separately from her husband. (*Re Gardiner, Ex pte. Coulson*, 20 Q. B. D. 249.) A receiving order may be made, after the married woman has ceased to carry on the business, in respect of debts incurred by her while carrying it on. (*Re Dagnall*, 1896, 2 Q. B. 407; *Re Worsley*, 1901, 1 K. B. 309.)

As to when a woman can be said to be "carrying on a trade separately from her husband," see *Re Worsley*, 1901, 1 K. B. 309. The fact that it is carried on under his management does not take it out of the section. (*Re Simon*, 1909, 1 K. B. 201; *Re Edwardes, Ex pte. Harvey*, 43 W. R. 509.) If and so far as *Re Helsby*, 63 L. J. Q. B. 261, decides anything to the contrary, it must be taken to be overruled. (*Re Simon, supra*).

It has been decided in Ireland that a married woman carrying on a farm separately from her husband is not carrying on a trade so as to be subject to bankruptcy proceedings. (*Re Long*, 1905, 2 I. R. 345.)

And if a woman is married pending the hearing of a bankruptcy petition, no receiving order can be made against her if she is not carrying on trade apart from her husband. (*Re A Debtor* 1898, 2 Q. B. 576.)

A bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*), must follow the form of the judgment on which it is founded. (*Re Howes*, 1892, 2 Q. B. 628.) Therefore a notice cannot be served on a married woman requiring her personally to pay the debt; because that would be inconsistent with the proper form of judgment, as laid down in *Scott* v. *Morley*, 20 Q. B. D. 120. (*Re Lynes*, 1893, 2 Q. B. 113.) And the rule

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is the same if judgment is obtained against her in the name of the firm under which she is trading. (*Re Handford & Co.*, 1899, 1 Q. B. 566.)

Notwithstanding the language of s. 19, p. 476, *post*, the life estate (without restraint on anticipation) of a married woman under a settlement will vest in her trustee in bankruptcy. (*Re Armstrong, Ex pte. Boyd*, 21 Q. B. D. 264.) And the life estate which is subject to a restraint on anticipation will vest in the trustee upon the death of the husband, as the restraint is thereby removed. (*Re Wheeler's Settmt., Briggs* v. *Ryan*, 1899, 2 Ch. 717.)

Property which a married woman might have appointed in exercise of a general power of appointment, but which she has not in fact so appointed, is not her separate property within this enactment; and her trustee in bankruptcy cannot compel her to exercise the power. (*Ex pte. Gilchrist, Re Armstrong*, 17 Q. B. D. 521; *Goatley* v. *Jones*, W. N. 1904, p. 44.)

If a married woman is carrying on a trade separately from her husband, it is not necessary to show that she has separate estate. (*Re Simon*, 1909, 1 K. B. 201; *Eddowes* v. *Argentine, &c. Co.* No. 2, 63 L. T. 364.) *Re Helsby*, 63 L. J. Q. B. 261, if and so far as it decided anything to the contrary, must be taken to be overruled. (*Re Simon, supra.*)

Sect. 2. Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Compare the Act of 1870, sects. 1, 7, and 8.

This section defines the property which, as regards women married after the Act, is thereby made their separate property. For the definition of their rights over such property, and the cases relating to that subject, see sect. 1, and notes thereon, *ante*.

The words, "separately from her husband," appear to qualify the word "engaged," as well as the words "carries on." The question as to the exclusion of the husband's agency is, of course, a question of fact; as to which, see *Petty* v. *Anderson*, 3 Bing. 170; *Smallpiece* v. *Dawes*, 7 C. & P. 40.

It seems that, by virtue of s. 19, p. 476, *post*, a settlement

M. W. P. Act, 1882, Sect. 2.

which by virtue of the marital right would have bound the wife's property before the Act, will bind it also after the Act, if she is a party to the settlement, although an infant. (*Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Re Shelton, Chancellor* v. *Brown*, 7 Times L. R. 638; *Buckland* v. *Buckland*, 1900, 2 Ch. 534.) But see now s. 2 of the M. W. P. Act, 1907, *post*, p. 489.

It has been held by Romer, J., in *Thornley* v. *T.*, 1893, 2 Ch. 229, that a conveyance to two married persons, in terms which, before the Act, would have created a tenancy by entireties, will after the Act, in the absence of any expression of intention, create a joint tenancy; also that a decree absolute for divorce turns an existing tenancy by entireties to a joint tenancy; and that subsequently to the decree the wife is entitled, under 4 & 5 Ann. c. 3 (Ruff. c. 16), s. 27, to an account against the husband, if in possession, for her moiety of the rents. As to tenancy by entireties, see Challis, R. P. 2nd ed. 344.

Sect. 3. Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

The words "other estate" do not mean only property *ejusdem generis* with "money." (*Re Donaldson*, 1902, 2 I. R. 310.)

It has been held that this section does not apply to money paid by a wife as surety for her husband (*Ex pte. Cronmire*, 1901, 1 K. B. 480), nor to money lent by the wife to the husband for purposes unconnected with his trade; and she may prove therefor in competition with creditors. (*Re Tidswell*, 35 W. R. 669.) A strong opinion was expressed in *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, by the V.-C. of Ireland, that the effect of the words, "or otherwise," is to enlarge the preceding words, and that the section is not restricted to money lent to the husband for some purpose similar to purposes of trade or business. This is inconsistent with the decision in *Re Tidswell*, *supra*. In *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505, Stirling, J., while following *Re Tidswell*, seems to have disapproved of it. But in *Re Clark*, 1898, 2 Q. B. 330, the decision in *Re Tidswell* was formally approved by the Court of Appeal. The onus of proof, as against the husband's creditors, lies upon the wife (*Re Genese*, 16 Q. B. D. 700), at any rate to the extent of requiring her to make out a *primâ facie* case (*Ex pte. Cronmire*, 1901,

M. W. P. Act, 1882, Sect. 3.

1 K. B. 480). But as against the husband, so far as the corpus of the wife's estate is concerned, the onus lies upon the husband. (*Alexander* v. *Barnhill, supra.*) As regards the income, even where the husband and wife are living together, the onus of showing that the income was not received by him as a gift lies upon the husband, there being no distinction in principle between capital and income, though the fact of the money being income received with the wife's consent may be material in respect of the weight of the evidence. (*Mercier* v. *Mercier*, 1903, 2 Ch. 98, explaining *Alexander* v. *Barnhill, supra.*) The section does not apply to money lent for trade purposes to a partnership in which the husband is a partner. (*Re Tuff*, 19 Q. B. D. 88.)

The section is not retrospective, and does not make a settlement executed in favour of a wife before the Act invalid as against creditors of the husband, if otherwise valid. (*Re Home*, 54 L. T. 301.)

This section does not interfere with the wife's right of retainer as administratrix. (*Re May, Crawford* v. *May*, 45 Ch. D. 499; *Simpson* v. *S.*, 1895, 1 I. R. 330; *Re Ambler, Woodhead* v. *Ambler*, 1905, 1 Ch. 697.) That right cannot be brought under any of the heads enumerated, for the assimilation of insolvency to bankruptcy, in Jud. Act, 1875, s. 10, or the Jud. Act (Ireland), 1877, s. 28, sub-s. (1).

By virtue of Jud. Act, 1875, s. 10, the section applies to claims by a wife against the estate of her deceased husband, if he is insolvent and his estate is administered by the Court. (*Re Leng, Tarn* v. *Emmerson*, 1895, 1 Ch. 652.) The contrary doctrine seems to have been held in Ireland in *Moore* v. *Smith*, 1895, 1 I. R. 530. It is to be observed that the Preferential Payments in Bankruptcy Act, 1888, upon which, in *Re Leng*, Lindley, L.J., laid some stress, does not apply to Ireland.

Sect. 4. Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

It has been held that such an appointment will not render the property liable for contracts entered into before the Act. (*Re Roper, R.* v. *Doncaster*, 39 Ch. D. 482.) But this only applies where the married woman was not capable of contracting debts before the Act. Where by reason of her having obtained a protection order under s. 21 of the Matrimonial Causes Act, 1857, she was in the position of a *feme sole*, it was held that appointed property was liable for debts incurred by her under the order before the Act. (*Re Hughes, Brandon* v. *Hughes*, 1898, 1 Ch. 529.) And see as to ante-nuptial debts, *Re Parkin, Hill* v. *Schwarz*, 1892, 3 Ch., p. 521. The appointment does not render the property liable for contracts entered

M. W. P. Act, 1882, Sect. 4.

into subsequently to the Act where the testatrix has no separate estate. (*Re Fieldwick, Johnson* v. *Adamson*, 1909, 1 Ch. 1, overruling *Re Ann, Wilson* v. *Ann*, 1894, 1 Ch. 549.)

Where a married woman in exercise of a power applied a sum of 1,100*l.* in payment of a debt stated in her will to be due from her, it was held that although the debt was in fact due from her husband and was paid by him after her death, the 1,100*l.* was under the section liable for her debts. (*Re Hodgson, Darley* v. *Hodgson*, 1899, 1 Ch. 666.)

Apart from this section, a covenant to execute a testamentary general power of appointment only in favour of the trustees of a settlement made on the marriage of a woman, the donee of the power, is good; and though it cannot be specifically enforced, yet, if it is broken, damages to the like amount can be recovered from her executors; and the appointed fund is assets for the purpose. (*Re Parkin, Hill* v. *Schwarz*, 1892, 3 Ch. 510.) And where the appointor was a married woman who died before 1883, her administrator with the will annexed could give a valid receipt for settled personalty appointed by her will under a general power. (*Re Peacock's Settmt., Kelcey* v. *Harrison*, 1902, 1 Ch. 552.)

Sect. 5. Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property, so gained or acquired by her as aforesaid.

This section defines the property which, as regards women married before the Act, is thereby made their separate property. For the definition of their rights over such property, and the cases relating to that subject, see sect. 1, and notes thereon, *ante*.

Property which had accrued in title before the Act is not brought within the section, and made separate property, by accruing in possession subsequently to the Act. (*Re Adames' Trusts*, 33 W. R. 834; *Re Tucker, Emanuel* v. *Parfitt*, 33 W. R. 932; *Re Hobson, Webster* v. *Rickards*, W. N. 1885, p. 218; 34 W. R. 195; *Re Tench's Trusts*, 15 L. R. Ir. 406; *Reid* v. *R.*, 31 Ch. D. 402; which cases have overruled *Baynton* v. *Collins*, 27 Ch. D. 604; *Re Thompson and Curzon*, 29 Ch. D. 177, and *Re Hughes' Trusts*, W. N. 1885, p. 62.) See also *Re Dixon, D.* v. *Smith*, 35 Ch. D. 4, at p. 5. Consequently where a woman married before 1883 acquired before 1883 a title in reversion to land, and the land was converted into money after 1882, but before the property fell into possession, the conversion gave her

M. W. P. Act, 1882, Sect. 5.

no new title, and the property was not made her separate estate by this section. (*Re Bacon, Toovey* v. *Turner*, 1907, 1 Ch. 475.)

A woman, who was an executrix and residuary legatee, married in 1880. She had discharged all the duties of the executorship. In 1883 she brought an action for a debt which had fallen due to her testator's estate in 1879. It was held that her beneficial title to the residue accrued before the Act. (*Edwards* v. *E.*, 1 Cab. & Ell. 229.) The question seems hardly to admit of argument.

Upon tenancy by entireties, see *Thornley* v. *Thornley*, 1893, 2 Ch. 229, cited under s. 2, p. 459, *ante*.

In *Re Beaupré's Trusts*, 21 L. R. Ir. 397, it was held, by an immense array of judicial authority in Ireland, that an interest limited by a marriage settlement, in default of issue of a specified person, to a class defined as the next of kin of that person, was such an interest in the next of kin, during such person's lifetime, as would be a contingent interest, the title to which accrued at the date of the settlement, and not at the date at which the class was ascertained. In *Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51, Kay, J., differed from *Re Beaupré's Trusts*. But he seems to have thought that an interest limited to a class of next of kin in default of issue of a specified person, stands exactly in the same position as the *spes successionis* of a person who is one of the possible next of kin of a living person, and who expects to take, if at all, under the statutes of distribution and not under any limitation. This proposition is in its nature highly disputable; and it seems to be only faintly supported by the English authorities cited by the learned judge.

Damages recovered for injuries to a wife married after the Act, in a joint action by husband and wife, are the wife's separate property under this section. (*Beasley* v. *Roney*, 1891, 1 Q. B. 509.)

As to the effect of settlements upon this section, see s. 19, and note thereon, p. 476, *post*.

Sect. 6. As to stock, &c. to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or

M. W. P. Act, 1882, Sect. 6.

public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient primâ facie evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

Compare the Act of 1870, ss. 2, 3, 4, and 5.

As to property of these descriptions held by a married woman as executrix or trustee, see s. 18, p. 475, *post*. The Act of 1870 did not provide for such cases. (See *Howard* v. *Bk. of England*, L. R. 19 Eq. 295; and note on s. 8, *post*.)

Sect. 7. As to stock, &c. to be transferred, &c. to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or

M. W. P. Act, 1882, Sect. 7.

made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Compare the Act of 1870, ss. 2, 3, 4, and 5.

Under the Act of 1870, a married woman could not be the legal owner of shares, &c., to which any liability was attached.

Sect. 8. Investments in joint names of married woman and others.

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or

shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

M. W. P. Act, 1882, Sect. 8.

See the next following section.

Under the Act of 1870, a married woman, registered as owner of stock jointly with other persons, could not transfer without the concurrence of her husband. (*Howard* v. *Bk. of England*, L. R. 19 Eq. 295.) The reason was that the bank could not be compelled to inquire whether she was interested beneficially or not.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Sect. 9. As to stock, &c. standing in the joint names of a married woman and others.

See note on the last preceding section.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband;

Sect. 10. Fraudulent investments with money of husband.

M. W. P. Act, 1882, Sect. 10.

and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Sect. 11. Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured

M. W. P. Act, 1882, Sect. 11.

and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

Compare the Act of 1870, s. 10. But a policy effected under that section by a husband who dies after the commencement of the Act of 1882, does not, in default of a trustee, vest in his personal representatives under the present section, but a trustee must be appointed under the former Act. (*Re Turnbull, T.* v. *T.*, 1897, 2 Ch. 415.)

A petition presented since the commencement of the present Act by a widow, for the appointment of trustees of the proceeds of a policy effected by her husband on his own life under the corresponding provisions of the Act of 1870, s. 10, for the benefit of his wife and children, should be entitled in the Matter of the Act of 1870, as that Act is not repealed by the present Act. (*Re Turnbull, ubi sup.; Re Kuyper's Policy Trusts*, 1899, 1 Ch. 38, not following *Re Soutar's Policy*, 26 Ch. D. 236.)

A policy effected by a man for his wife and children either under the Act of 1870 (*Re Parker's Policy*, 1906, 1 Ch. 526) or under the Act of 1882 (*Re Browne's Policy*, 1903, 1 Ch. 188) enures for the benefit of an after-taken wife and the children by her, unless the policy is so worded as to exclude them. (*Re Griffiths' Policy*, 1903, 1 Ch. 739.)

If the policy is taken out for the benefit of the husband, the trust created by the policy and the Act in his favour is not dependent on his surviving the wife, and if he predeceases her, it continues in favour of his executors. (*Prescott* v. *P.*, 1906, 1 I. R. 155.)

In *Re Mellor's Policy*, 6 Ch. D. 127, it was held by Malins, V.-C., that the proceeds of a policy effected as above mentioned under the Act of 1870, which contained no declaration of trust, but was only stated to be for the benefit of the wife and children, ought to be settled upon the usual trusts of a settlement; that is, upon the widow for life, with remainder to the children on attaining twenty-one or (if daughters) on marriage under that age; but subsequently, *S. C.* 7 Ch. D. 200, he permitted the fund to be

M. W. P. Act, 1882, Sect. 11.

distributed as in case of an intestacy, upon the ground that the family were in very poor circumstances. In *Re Adam's Policy*, 23 Ch. D. 525, where the wife had died in the lifetime of the husband, Chitty, J., without actually deciding whether the wife, if living, would have taken for life, or as a joint tenant with the children, held that the children took as joint tenants; but he intimated a leaning towards the former opinion. It was subsequently held by North, J., that the proceeds of a policy taken out as above mentioned under the Act of 1870 go to the widow and children as joint tenants. (*Re Seyton, S.* v. *Satterthwaite*, 34 Ch. D. 511.) This decision was subsequently followed by Chitty, J., in *Re Davies' Policy*, 1892, 1 Ch. 90.

On an application to appoint trustees, the Court has no jurisdiction to adjudicate on the rights of the widow and children *inter se*. (*Re Davies' Policy, supra; Re Graham's Policy*, 29 L. R. Ir. 498. In *Re Adam's Policy, supra*, a declaration of the Court's opinion was made by Chitty, J.; but subsequently, in *Re Davies' Policy, supra*, the same judge appears to have recognized the want of jurisdiction.)

The present Act for the first time provides that the person insured may, by the policy, or by a separate memorandum, appoint trustees of the policy moneys. In the policy itself, it is clear, from the language of the section, that special trusts might be declared; and probably the same thing might be done by a separate memorandum appointing trustees.

At the request of the wife and children, a policy may be exchanged for another policy of smaller amount, but fully paid up. (*Schultze* v. *S.*, 56 L. J. Ch. 356.)

If the husband is murdered by the wife, and she is attainted of the felony, the executors of the husband can maintain an action to recover the policy moneys; and the statutory trust in favour of the wife is incapable of being executed; and if there are no children of the marriage, the policy moneys form part of the husband's estate. (*Cleaver* v. *Mutual, &c. Life Association*, 1892, 1 Q. B. 147.)

Sect. 12. Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such

M. W. P. Act, 1882, Sect. 12.

property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

This section does not enable a wife to commence criminal proceedings for defamatory libel against her husband (*Reg.* v. *Lord Mayor of London*, 16 Q. B. D. 772), or to bring an action against him for false imprisonment or malicious prosecution. (*Tinkley* v. *T.*, 25 Times L. R. 264.) But she may bring an action against him for the return of her personal property detained by him. (*Larner* v. *Larner*, 1905, 2 K. B. 539.)

When an injunction is granted upon the application of a married woman, her sole undertaking as to consequent damages is sufficient. (*Re Prynne*, W. N. 1885, p. 144; 53 L. T. 455; *Pike* v. *Cave*, W. N. 1893, p. 91; 62 L. J. Ch. 937.) Where such an undertaking has been given, a husband (defendant) is not debarred from enforcing it against his wife (plaintiff) by the language of this section relating to torts. (*Hunt* v. *H.*, W. N. 1884, p. 243; 54 L. J. Ch. 289.)

As a husband is not liable to criminal proceedings for taking his wife's money while they are living together, a mere allegation that he has robbed his wife will not, if they are in fact living together, support an action of slander. (*Lemon* v. *Simmons*, 57 L. J. Q. B. 260.) A communication by a husband to his wife cannot amount to the publication of a libel. (*Wennhak* v. *Morgan*, 20 Q. B. D. 635.)

By s. 4 of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), the wife or husband of a person charged with an offence under this section may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

As an offence under this section is not a felony, the receiver of the stolen property cannot be convicted of felony under the Larceny Act, 1861 (*Reg.* v. *Streeter*, 1900, 2 Q. B. 601), though he is guilty of a misdemeanour. (*Rex* v. *Payne*, 1906, 1 K. B. 97.)

Sect. 13. Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her

M. W. P. Act, 1882, Sect. 13.

separate property, for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Compare the Act of 1870, s. 12, so far as it is not repealed by the Act of 1874, s. 1.

In an action against husband and wife jointly to recover a debt of the wife contracted before marriage, which had taken place after the Acts of 1870 and 1874, but before the present Act, it was held that judgment might be entered against the wife under R. S. C. 1883, Ord. XIV. r. 1, making the debt and costs payable out of her separate property, with a restriction as regards execution similar to that settled by the Court in *Scott* v. *Morley*, 20 Q. B. D. 120, at p. 132; as to which, see note on s. 1, sub-s. (2), at p. 452, *ante*. (*Downe* v. *Fletcher*, 21 Q. B. D. 11.)

Debts incurred during a first marriage are, for the purposes of this section, debts incurred before marriage, if she is sued during the coverture of a second marriage. (*Jay* v. *Robinson*, 25 Q. B. D. 467.)

If judgment is recovered against a *feme sole*, entitled to an annuity subject to restraint on anticipation, and a receiver is

appointed, and she subsequently marries, whereby the restraint comes into operation, this will not affect the receiver's right to receive the annuity. (*Kirk* v. *Murphy*, 30 L. R. Ir. 508.) But see *Molony* v. *Harney*, 1895, 2 I. R. 169.

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14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgments may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Sect. 14. Husband to be liable for his wife's debts contracted before marriage to a certain extent.

Compare the Act of 1874, sects. 2 and 5.

This section seems not to apply to the husbands of women married between the commencement of the Act of 1870 and the commencement of the Act of 1874, that is, from 9th August, 1870, to 30th July, 1874.

See, as to a husband's liability after his wife's death, *Bell* v. *Stocker*, 10 Q. B. D. 129, cited in the note to the next following section.

A husband, executor of his wife's will made under a testamentary power, may retain out of her estate her funeral expenses, although the estate is insolvent. (*Re M'Myn*, *Lightbown* v. *M'Myn*, 33 Ch. D. 575.)

An unsatisfied judgment against the wife is no defence in an action against the husband. (*Beck* v. *Pierce*, 23 Q. B. D. 316.) The Limitation Act, 1623, is a good defence against claims

M. W. P. Act, 1882, Sect. 14.

arising more than six years before the commencement of the action. (*Ibid.*)

If a husband promises to creditors of his wife that he will see them paid, and thereby gets time given, he is primarily liable, and not only as guarantor. (*Quinn* v. *Moloney*, 28 L. R. Ir. 12.)

Sect. 15. Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Compare the Act of 1874, sects. 1, 3, and 4.

Under the Acts of 1870 and 1874, a husband was not liable, after his wife's death, for her debts contracted before marriage, whether he had acquired property through her or not. (*Bell* v. *Stocker*, 10 Q. B. D. 129.)

See *Beck* v. *Pierce*, 23 Q. B. D. 316, cited in note on s. 14, *ante*.

Sect. 16. Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by

the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

M. W. P. Act, 1882, Sect. 16.

This section did not enable a husband to give evidence in criminal proceedings against his wife. (*Reg.* v. *Brittleton*, 12 Q. B. D. 266.) But now, by the M. W. P. Act, 1884, s. 1, p. 482, *post*, both husband and wife are competent witnesses, and, except when defendant, compellable to give evidence. And by s. 4 of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), the wife or husband of a person charged with an offence under this section may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

As the stealing by a wife of her husband's property is not made a felony, the receiver cannot be convicted under the Larceny Act, 1861, s. 91 (*Reg.* v. *Streeter*, 1900, 2 Q. B. 601), though he is guilty of a misdemeanour. (*Rex* v. *Payne*, 1906, 1 K. B. 97.) See the case last cited for the proper form of indictment of the receiver, and *Rex* v. *James*, 1902, 1 K. B. 540, for the proper form of indictment of the wife.

Sect. 17. Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way

M. W. P. Act, 1882. Sect. 17.

as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Compare the Act of 1870, s. 9.

Under this section a wife who has been judicially separated from her husband is entitled to an inquiry whether chattels retained by him are her separate property. (*Phillips* v. *P.*, 13 P. D. 220.)

The registrar has no jurisdiction to make an order directing the chattels to be delivered to the wife. (*Wood* v. *W.*, 14 P. D. 157.)

The Act has not made a gift of paraphernalia impossible; and the question is one of evidence. (*Tasker* v. *T.*, 1895, P. 1.)

Under this section the Court has declared a married woman to be entitled to a public-house as her separate property, and has restrained her husband from interfering with the business carried on by her there, though it refused to make any order preventing him from entering the house. (*Gaynor* v. *Gaynor*, 1901, 1 I. R. 217.)

The section does not deprive a woman of the right which

she has under s. 12 of proceeding by action against her husband for the return of her personal property detained by him. (*Larner* v. *Larner*, 1905, 2 K. B. 539.)

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A summons under s. 17 must be an originating summons in the form prescribed by Ord. LIV., r. 4B, unless an action is pending. At one time it was the practice in the Probate, Divorce, and Admiralty Division to allow proceedings to be begun by an ordinary summons where no action was pending, but on the attention of Sir F. Jeune, P., being called in chambers to the above order and rule, he stated that the practice was wrong and should be discontinued.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid, of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

Sect. 18. Married woman as an executrix or trustee.

It was held by Bacon, V.-C., that a married woman who was a devisee and trustee for sale of real estate, was, under the circumstances, a "bare trustee" within the meaning of the Vendor and Purchaser Act, 1874, s. 6, p. 4, *ante*, although she was entitled to a share of the proceeds of sale; and that therefore she might convey without her husband's concurrence, and without separate acknowledgment. (*Re Docwra, D.* v. *Faith*, 29 Ch. D. 693.) But in that case a sale had actually been made under an order of the Court; and the decision seems to have rested upon that ground. A trustee for sale is not, under ordinary circumstances, a bare trustee. A mortgagee trustee who has been paid off and is reconveying is a bare trustee. (*Re Howgate and Osborn*, 1902, 1 Ch. 451.)

It will be observed that this section, at all events so far as regards conveyances, refers only to annuities, deposits, stocks, and similar property. Sects. 2 and 5, *ante*, which refer to all kinds of property, evidently contemplate property of which the married woman is not a trustee. The question, whether a married woman trustee, holding property under the provisions of this Act, can convey real estate as a *feme sole*, was long regarded as doubtful, and it was ultimately decided that the concurrence of the husband was necessary (*Re Harkness and Allsopp*, 1896, 2 Ch. 358), though not where the wife was a

M. W. P. Act, 1882, Sect. 18.

mortgagee and not a trustee. (*Re Brooke and Fremlin*, 1898, 1 Ch. 647; *Re West and Hardy*, 1904, 1 Ch. 145.)

But s. 1 of the Married Women's Property Act, 1907 (*post*, p. 488), empowers a married woman without her husband to dispose of real or personal property held by her as trustee or personal representative in like manner as if she were a *feme sole*; and the section confirms all such dispositions made after the 31st December, 1882.

Sect. 19. Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

In a settlement made after the Act, a restraint on anticipation can be imposed without also using the words, "for her separate use," because the latter are now supplied by the Act. (*Re Lumley, Ex pte. Hood-Barrs*, 1896, 2 Ch. 690; *Re Williams, W.* v. *Grant*, 76 L. T. 150.)

This section does not render property comprised in a settlement, made before the Act, liable to the married woman's debts, if it would not have been so liable independently of the Act. (*Beckett* v. *Tasker*, 19 Q. B. D. 7. See also *Myles* v. *Burton*, 14 L. R. Ir. 258.)

The life estate (without restraint on anticipation) of a married woman under a settlement will vest in her trustee in bankruptcy. (*Re Armstrong, Ex pte. Boyd*, 21 Q. B. D. 264.) And when the husband dies, a life estate which has been subject to restraint will vest in the trustee, as the restraint is removed. (*Re Wheeler's Settmt., Briggs* v. *Ryan*, 1899, 2 Ch. 717.)

Under the Act of 1870, a restraint against anticipation would

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not have defeated the claims of her ante-nuptial creditors. (See *Axford* v. *Reid*, 22 Q. B. D. 548.) This decision is no longer an authority, as the Act of 1870 is now repealed. And a judgment against a married woman in respect of a debt contracted by her before marriage cannot be enforced against her separate property subject to a restraint upon anticipation where the restraint is not contained in a settlement of her own property made or entered into by herself. (*Birmingham, &c., Society* v. *Lane*, 1904, 1 K. B. 35.)

Notwithstanding the great lengths to which the Courts have gone, with a view to uphold ante-nuptial settlements, such a settlement can be set aside under 13 Eliz. c. 5, if it was made by collusion between the parties for the purpose of defeating the husband's creditors. (*Re Pennington*, W. N. 1888, p. 205; 5 Times L. R. 29, and cases there cited.)

A post-nuptial settlement made by a woman married before the Act, and being then under age, which is stated to have been approved by the Court under the Infant Settlements Act, 1855, containing a restraint on anticipation, has been held, by a Divisional Court in the Queen's Bench Division, to be valid against post-nuptial creditors. (*Hemingway* v. *Braithwaite*, 61 L. T. 224.)

The order giving leave to enter final judgment should state that execution is restricted to such separate estate as the married woman is not restrained from anticipating, unless such restraint is imposed by a settlement made by herself. (*Bursill* v. *Tanner*, 13 Q. B. D. 691; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409.) And it would seem that such settlement must have been made since the commencement of the Act. (See *Turnbull* v. *Forman*, 15 Q. B. D. 234. See also *Smith* v. *Whitlock*, 34 W. R. 414.) In such a case the debt may be ordered to be paid by instalments, subject to a similar restriction. (See *Johnstone* v. *Browne*, 18 L. R. Ir. 428, in which case, the debtor having failed to pay the instalments, an order was subsequently made for her committal to prison: 20 L. R. Ir. 443.)

Judgment may be signed against a married woman under R. S. C. Ord. XIV.; but not unless the plaintiff consents to limit its operation to her separate property. (*Moore* v. *Mulligan*, Bittlest. 127. But see *Gunston* v. *Maynard*, 75 L. T. Newsp. p. 102.) And a receiver may be appointed of her separate property which she is not restrained from anticipating. (*Perks* v. *Mylrea*, W. N. 1884, p. 64; Bittlest. 128.)

A covenant entered into by a woman in anticipation of her marriage before the Act, to settle after-acquired property, except interests limited to her separate use, will include property bequeathed to her after the Act absolutely. (*Re Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, *Christian* v. *Whitaker*, 34 Ch. D. 227.) It has been held that this doctrine does not apply to a post-nuptial settlement made before the Act, because the wife, being under disability, was unable to contract: *Re Queade's Trusts*, W. N. 1885, p. 99; 33 W. R. 816; but this

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case was disapproved by the Court of Appeal in *Hancock* v. *H.*, 38 Ch. D. 78, where it was held that an ante-nuptial settlement, made before the Act, which contained a similar covenant on the part of the husband alone, would include property coming to the wife subsequently to the Act. See also *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Re Shelton, Chancellor* v. *Brown*, 7 Times L. R. 638; and *Buckland* v. *B.*, 1900, 2 Ch. 534, where it was held that a settlement will be enforced under s. 19, although it was not binding on the wife by reason of her infancy.

The law has, however, been altered by s. 2 of the Married Women's Property Act, 1907 (*post*, p. 489), which provides that, notwithstanding s. 19 of the Act of 1882, a settlement made after the 1st January, 1908, by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age or confirmed by her after she attains full age. But if she dies an infant, any covenant or disposition by her husband contained in the settlement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if the Act had not been passed; and nothing in the section shall render invalid any settlement under the Infants' Settlement Act, 1855.

A widow, having a general power of appointment by will over property comprised in a settlement made on her former marriage, was held entitled, after her subsequent marriage, to have the property transferred to her, without executing any formal release of the power. (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622.) In that case the order was, that the fund should be transferred to the husband and wife jointly; but this could only have been done at the wife's request, because the husband had evidently no interest in the fund.

Debts incurred during a first marriage are, for the purposes of this section, debts incurred before marriage, if she is sued during the coverture of a second marriage. (*Jay* v. *Robinson*, 25 Q. B. D. 467.)

It was held in *Kirk* v. *Murphy*, 30 L. R. Ir. 508, that if judgment is recovered against a *feme sole*, entitled to an annuity subject to restraint on anticipation, and a receiver appointed, and she subsequently marries whereby the restraint comes into operation, this will not affect the receiver's right to receive the annuity. This seems to be inconsistent with the subsequent case of *Molony* v. *Harney*, 1895, 2 I. R. 169.

A judgment cannot be enforced against arrears of income, to which restraint applies, accruing due after the date of the judgment. (*Hood-Barrs* v. *Cathcart*, 1894, 2 Q. B. 559.) But it can be enforced against arrears accrued due at the date of the judgment, which have not been paid to the married woman. (*Hood-Barrs* v. *Heriot*, 1896, A. C. 174; overruling *Pillers* v. *Edwards*, 1894, W. N. p. 212, 71 L. T. 788, and reversing

Loftus v. *Heriot*, 1895, 2 Q. B. 212; of which last two cases, the former was unwillingly decided only in deference to the latter.)

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Under s. 2 of the Married Women's Property Act, 1893 (*post*, p. 485), costs of proceedings instituted by a married woman may be ordered to be paid out of property which is subject to a restraint on anticipation.

Sect. 20. Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

31 & 32 Vict. c. 122.

Compare the Act of 1870, s. 13. A married woman cannot be compelled to maintain her father under the Poor Law Acts. (*Pontypool Union* v. *Buck*, 1906, 2 K. B. 896.) But the Married Women's Property Act, 1908, 8 Edw. 7, c. 27, now provides that a married woman having separate property shall be subject to all such liability for the maintenance of her parent or parents as a *feme sole* is now by law subject to for the maintenance of such parent or parents. The Act only applies to England and Wales, and came into operation on the 1st January, 1909.

Sect. 21. Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always,

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that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Compare the Act of 1870, s. 14.

Sect. 22. Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Sect. 23. Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

The words "as she would be" seem to be here equivalent to the words "as she would have and be liable to." The words might with advantage have been altogether omitted.

It has been held in *Surman* v. *Wharton*, 1891, 1 Q. B. 491, that in this section the phrase "the legal personal representative" may include a husband taking leaseholds *jure mariti*, who has entered into possession thereof without taking out administration to his wife's estate. This is perhaps a somewhat forced construction; but the decision might be supported by the terms of s. 1, sub-s. (3), p. 455, *ante*.

Sect. 24. Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before

or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

M. W. P. Act, 1882, Sect. 24.

An order against a married woman to compel her to make good a devastavit or breach of trust, should be in the form settled in *Scott* v. *Morley*, 20 Q. B. D. 120. But where she is ordered to pay into Court trust money which she admits having received, the order should not be limited to her separate estate, and if she fails to comply with the order, she may be attached. (*Re Turnbull, T.* v. *Nicholas*, 1900, 1 Ch. 180.)

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Sect. 25. Commencement of Act.

26. This Act shall not extend to Scotland.

Sect. 26. Extent of Act.

27. This Act may be cited as the Married Women's Property Act, 1882.

Sect. 27. Short title.

THE

MARRIED WOMEN'S PROPERTY ACT, 1884.

(48 & 49 Vict. c. 14.)

An Act to amend the sixteenth section of the Married Women's Property Act, 1882.

[23rd June, 1884.]

45 & 46 Vict. c. 75.

Whereas by section sixteen of the Married Women's Property Act, 1882, a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal proceedings, while section twelve of the same Act declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said Act otherwise amended:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Husband or wife competent witness in criminal proceedings under 45 & 46 Vict. c. 75.

1. In any such criminal proceeding against a husband or wife as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.

See the M. W. P. Act, 1882, s. 16, p. 472, *ante*.

M. W. P. Act, 1884, Sect. 2.

Short title.

2. This Act may be cited as the Married Women's Property Act, 1884, and this Act and the Married Women's Property Act, 1882, may be cited together as the Married Women's Property Acts, 1882 and 1884.

THE

MARRIED WOMEN'S PROPERTY ACT, 1893.

(56 & 57 Vict. c. 63.)

An Act to amend the Married Women's Property Act, 1882.
[5th December, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Effect of contracts by married women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate

property which at that time or thereafter she is restrained from anticipating.

M. W. P. Act, 1893, Sect. 1.

See the M. W. P. Act, 1882, s. 1, sub-sects. (3) and (4), now repealed by s. 4, *infra*, and notes thereon, p. 455, *ante*; and *Barnett* v. *Howard*, 1900, 2 Q. B. 784.

In order that a contract may bind the separate property of a married woman under this section, such contract must be entered into by her for the first time after the passing of the Act. Consequently her acknowledgment since the Act of the fact that she had had moneys advanced to her prior to the Act at a time when she had no separate estate does not make her liable under the section. (*Re Wheeler, Hankinson* v. *Hayler*, 1904, 2 Ch. 66.)

If a married woman incurs a debt with her husband's authority, she does so as agent for her husband, and is not within the section, whether the creditor knew or did not know that she was a married woman. (*Paquin* v. *Beauclerk*, 1906, A. C. 148.)

As to the effects of restraint on anticipation, see notes on the M. W. P. Act, 1882, s. 19, p. 476, *ante*.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

Sect. 2. Costs may be ordered to be paid out of property subject to restraint on anticipation.

This section does not enable the Court to alter the effect of an order made before the Act came into operation. (*Re Lumley*, 1894, 3 Ch. 135.) But it applies to actions pending at the date of the Act's commencement. (*Re Godfrey, Thorne-George* v. *Godfrey*, W. N. 1895, p. 12; 43 W. R. 244.)

This section does not apply to an appeal by a married woman who is a defendant. (*Hood-Barrs* v. *Cathcart*, No. 2, 1894, 3 Ch. 376; approved by H. L. *Hood-Barrs* v. *Heriot*, No. 2, 1897, A. C. 177.) Nor to a petition (*Hollington* v. *Dear*, W. N. 1895, p. 35) or summons (*Gordon* v. *Gordon*, 1904, P. 163) by a married woman defendant. But it does apply to an appeal by a married woman who is plaintiff (*Paget* v. *Paget*, 1898, 1 Ch. 470, 477, more fully reported on this point, 67 L. J. Ch. p. 271), and to an application by a married woman plaintiff for a new trial. (*Dresel* v. *Ellis*, 1905, 1 K. B. 574.) The general rule appears to be that an appeal by a married woman plaintiff will, if it fails, be dismissed with costs in the

M. W. P. Act, 1893, Sect. 2.

usual way. (*Perrins* v. *Bellamy*, 68 L. J. Ch. 397, reported on another point, 1899, 1 Ch. 797.) Interpleader proceedings commenced in consequence of a claim by a married woman are "instituted" by her within the meaning of the section (*Nunn* v. *Tyson, Tyson Claimant*, 1901, 2 K. B. 487), and so is a summons for leave to intervene in a pending probate action for the purpose of asserting an independent interest in the subject-matter. (*Crickitt* v. *Crickitt*, 1902, P. 177.)

An order for an inquiry as to the separate property of a married woman, against whom judgment has been given, does not authorize the examination of any person other than the judgment debtor. (*Hood-Barrs* v. *Heriot, Ex pte. Blyth*, 1896, 2 Q. B. 338.)

An executor's action to establish a will, which is rendered necessary by a *caveat* entered by a married woman, is not instituted by her within the meaning of this section. (*Moran* v. *Place*, 1896, P. 214.)

When an action is dismissed with costs, the order is in the form in use before the Act, with the addition of the words: "With liberty to apply for payment out of any property which is subject to restraint on anticipation." (*Davies* v. *Treharris Brewery Co.*, "The Reports," vol. 13, p. 219.)

It is not a matter of course to make an order under the section, but the onus lies on the married woman to show why it should not be made. (*Pawley* v. *Pawley*, 1905, 1 Ch. 593.) The fact that the husband is co-plaintiff with the wife is not a sufficient reason for refusing to make the order. (*Marchioness of Huntly* v. *Gaskell*, 1905, 2 Ch. 656.)

Sect. 3. Will of married woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

This section applies to the will of every married woman dying after the Act's commencement. (*Re Wylie, W.* v. *Moffat*, 1895, 2 Ch. 116.)

The Wills Act, 1837, s. 24, is as follows:—

> "And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

For notes and cases on the testamentary capacity of married women under the Acts, see the M. W. P. Act, 1882, s. 1, sub-s. (1), p. 449, *ante*.

M. W. P. Act, 1893. Sect. 4. Repeal.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Sect. 5. Short title.

5. This Act may be cited as the Married Women's Property Act, 1893.

Sect. 6. Extent.

6. This Act shall not apply to Scotland.

THE

MARRIED WOMEN'S PROPERTY ACT, 1907.

(7 Edw. 7, c. 18.)

An Act to amend the Married Women's Property Act, 1882. [21st August, 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Sect. 1. Dispositions of trust estates by married women.

1.—(1.) A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a femme (*sic*) sole.

(2.) This section operates to render valid and confirm all such dispositions made after the thirty-first day of December one thousand eight hundred and eighty-two, whether before or after the commencement of this Act, but, where any title or right has been acquired through or with the concurrence of the husband before the commencement of this Act, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section.

The effect of this section is to get rid of the decision in *Re Harkness and Allsopp* (1896, 2 Ch. 358), where it was held that a married woman trustee could not convey real estate without the concurrence of her husband. (See note to

M. W. P. Act, 1882, s. 18, *ante*, p. 475.) The correctness of this decision has never been questioned by any Court, and the section removes a difficulty which was constantly occurring in conveyancing. It may be objected that "*femme sole*," as spelled in sub-s. (1), is a person unknown to the law of this country, but the Court will not allow the usefulness of the section to be affected by a blunder in orthography.

M. W. P. Act, 1907, Sect. 1.

It will be observed that the section does not, like s. 1 (1) of the M. W. P. Act, 1882, enable a married woman to acquire and hold as well as to dispose of trust property. But s. 24 of the Act of 1882, which empowers her to accept a trust or the office of executrix or administratrix, renders this unnecessary, and as s. 1 (1) of the Act of 1907 empowers her to dispose of property "held" by her as trustee, it implies that she has power to hold and inferentially to acquire such property.

2.—(1.) Notwithstanding section nineteen of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age.

Sect. 2. Settlements of a married woman's separate property. 45 & 46 Vict. c. 75.

(2.) But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed.

(3.) Nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infant Settlements Act, 1855.

18 & 19 Vict. c. 43.

See note on s. 19 of the M. W. P. Act, 1882, *ante*, p. 476.

3.—(1.) Where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is by virtue of the Married Women's Property Act, 1882, made her separate property, then she alone shall, in respect of that estate, be the protector of the settlement.

Sect. 3. Married woman entitled to prior estate to be protector of settlement alone.

M. W. P. Act, 1907. Sect. 3.

(2.) This section applies to disentailing assurances and surrenders made after the thirty-first day of December one thousand eight hundred and eighty-two, and as well before as after the commencement of this Act.

It is provided by s. 24 of the Fines and Recoveries Act, 1833, that where a married woman is protector of a settlement in respect of a prior estate thereby settled to her separate use she alone shall in respect of such estate be the protector of such settlement. And in *Keer* v. *Brown*, John. 138, it was held that the section applied where the settlement was executed before the passing of the Act. Sect. 3 of the Act of 1907 makes it clear that a married woman is sole protector where the prior estate is her separate property not by the language of the settlement, but by the operation of the M. W. P. Act, 1882.

Sect. 4. Short title; commencement; construction.

4.—(1.) This Act may be cited as the Married Women's Property Act, 1907.

(2.) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

(3.) This Act shall not extend to Scotland.

45 & 46 Vict. c. 75. 47 Vict. c. 14. 56 & 57 Vict. c. 63.

(4.) This Act shall be construed with the Married Women's Property Acts, 1882, 1884, and 1893, and those Acts and this Act may be cited together as the Married Women's Property Acts, 1882 to 1907.

THE

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

(51 & 52 Vict. c. 51.)

An Act for registering certain Charges on Land, and for facilitating Searches for them.

[24th December, 1888.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Part I.—Introductory.

1. This Act may be cited as the Land Charges Registration and Searches Act, 1888. Sect. 1. Short title.

2. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: Provided that any rules under this Act may be made, and any other thing for the purpose of bringing this Act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this Act. Sect. 2. Commencement.

3. This Act shall not extend to Scotland or Ireland. Sect. 3. Extent.

4. In this Act: Sect. 4. Interpretation.

"Land" includes lands, messuages, tenements,

Land Charges &c. Act, 1888, Sect. 4.

and hereditaments corporeal and incorporeal of any tenure.

This definition does not properly include terms of years; see note on Conv. Act, 1881, s. 2, sub-s. (ii.), p. 10, *ante*. But in s. 5, sub-s. (2), *post*, the word "land" may probably be interpreted to include them. It is still more difficult to stretch the language used so as to include equitable estates or equities of redemption.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this Act.

"Act of Parliament" includes local and personal Act.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

24 & 25 Vict. c. 133.

46 & 47 Vict. c. 61.

The Land Drainage Act, 1861, 24 & 25 Vict. c. 133, ss. 34, 35, and 36, is printed p. 575, *post*; and the Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28, s. 9 (which replaces the Act of 1883, s. 29, so far as the present section is concerned), together with the First Schedule, is printed p. 576, *post*.

This definition does not include charges imposed upon premises, in respect of which expenses have been incurred by

local authorities, by the Public Health Act, 1875, s. 257. (*Reg.* v. *Vice-Registrar of Land Registry*, 24 Q. B. D. 178.)
See also note on s. 10, p. 497, *post.*

Land Charges &c. Act, 1888, Sect. 4.

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887.

50 & 51 Vict. c. 57.

The Deeds of Arrangement Act, 1887, 50 & 51 Vict. c. 57, s. 4, is as follows:—

"4.—(1.) This Act shall apply to every Deed of Arrangement, as defined in this section, made after the commencement" [1st January, 1888] "of this Act.

"(2.) A Deed of Arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—

"(a) An assignment of property;

"(b) A deed of or agreement for a composition;

"And in cases where creditors of a debtor obtain any control over his property or business:—

"(c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business;

"(d) A letter of licence authorizing the debtor or any other person to manage, carry on, realize, or dispose of a business, with a view to the payment of debts; and

"(e) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorizing the debtor or any other person to manage, carry on, realize, or dispose of the debtor's business, with a view to the payment of his debts."

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

Part II.—Registration of Writs and Orders affecting Land.

Sect. 5. Register of writs and orders affecting land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order

Land Charges &c. Act, 1888, Sect. 5.

affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

The registration is optional, except that the omission to register entails the inconveniences mentioned in s. 6, *post*. It is now, however, provided, by s. 2 of the Land Charges Act, 1900 (*post*, p. 501), which came into operation on the 1st July, 1901, that a judgment or recognizance, whether obtained or entered into before or after the commencement of the Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land, until a writ or order is registered under s. 5.

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

In some cases difficulty will be experienced in ascertaining what name is to be placed upon the register. This is quite clear only in one case, namely, where there exists a tenant in fee simple, for his own benefit, free from incumbrances. Cases might easily be mentioned in which the difficulty would be considerable. An owner in fee simple might contract debts and devise his land in settlement; then die, leaving the land to devolve upon an equitable tenant for life. If the creditors were to sue the settlor's executor, who refused to admit assets, it would be necessary to administer the testator's real and personal estate; thereupon, judgment for administration having been given, an order might be obtained appointing a receiver; and such order seems to be an order within this section. It does not clearly appear in whose name or names this order should be registered.

It is suggested that in such a case the order ought to be registered in the name of the testator, although it might be questioned whether a deceased testator is a "person."

The connection, or absence of connection, of the Act with the subject of bankruptcy is somewhat obscure. Although, by s. 4, *supra*, "'judgment' does not include an order made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction," that would be no reason why any "writs or orders" which are not judgments should not come within the present section, although made by a Court of Bankruptcy. But such writs and orders must either be "for the purpose of enforcing a judgment," which does not include a bankruptcy judgment, or for the purpose of enforcing a "statute or recognizance," which is not likely to occur, or must be an "order appointing a receiver or sequestrator of land." The appointment of a trustee in bankruptcy renders superfluous the appointment of a receiver. A writ of *sequestrari facias de bonis ecclesiasticis*

Land Charges &c. Act, 1888, Sect. 5.

seems not to be an order. Moreover, by the Bankruptcy Act, 1883, s. 52, the certificate of the appointment of the trustee in bankruptcy is made sufficient authority for the granting of sequestration without any writ or other proceeding.

The other kind of sequestration referred to in the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 8, and *Sykes* v. *Dyson*, L. R. 9 Eq. 228, seems to be confined to Courts of Equity. Upon the whole, it would appear that, by a very obscure route, we come to the conclusion that the Act lies wholly outside bankruptcy jurisdiction and practice.

(3.) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

As to registration in the Central Office, see Conv. Act, 1882, s. 2, sub-s. (1), at p. 181, *ante*.

Sect. 6. Protection of purchasers against non-registered writs and orders.

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

Provided that—

(*a.*) *Where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled "An Act to amend the law relating to future judgments, statutes, and recognizances," nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;*

(*b.*) Where the proceeding in which the writ or

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order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

By s. 3 of the Land Charges Act, 1900 (*post*, p. 502), it is provided that s. 6 shall apply to every writ and order affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained before or after the commencement of the Act, and to every delivery in execution, or other proceeding taken in pursuance of any such writ or order or in obedience thereto. And proviso (a) of s. 6 is repealed.

All writs and orders are excepted from the operation of the section, which are issued or made in any proceeding registered as a *lis pendens*. As to the registration of *lis pendens*, see 2 & 3 Vict. c. 11, s. 7.

By 27 & 28 Vict. c. 112, s. 1, no judgment (although registered under the old system) which is entered up after 29th July, 1864, affects any land until the land has been actually delivered in execution in pursuance of the judgment. It is conceived that this rule will apply to writs and orders, registered under the present Act, issued or made for the purpose of enforcing a judgment. The Act contains nothing to give to any writ or order any greater force or power than it had before the Act.

By 27 & 28 Vict. c. 112, s. 3, every writ or other process of execution, by virtue of which any land has been actually delivered in execution, is to be registered under 23 & 24 Vict. c. 38, and no other or prior registration is to be deemed necessary for any purpose. It was held in *Re Pope*, 17 Q. B. D. 743, that when the land has been delivered in execution this cures a prior defect of registration, and that the execution cannot be impeached by reason of such defect. In that case the execution was not under an *elegit*, but was an equitable execution effected by the appointment of a receiver, which was held to be a "process of execution" within the meaning of the above-cited enactment.

The present section, which makes even the delivery in execution under an unregistered writ void against the purchaser, abrogates the ruling of *Re Pope*, *supra*; but subsequent registration would apparently cure the defect.

Part III.—Registration of Deeds of Arrangement.

Sect. 7. Register of deeds of arrangement affecting land.

7. A register (in this Act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of

arrangement may be registered therein in the prescribed manner, in the name of the debtor.

Land Charges &c. Act, 1888, Sect. 7.

As to the definition of "deed of arrangement," see s. 4, *ante*.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Sect. 8. Registration of deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this Act, shall be void as against a person who, after the commencement of this Act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this Act until the expiration of one year from the commencement of this Act if registered within that year.

Sect. 9. Protection of purchasers against unregistered deeds of arrangement.

Part IV.—Registration of Land Charges.

10. A register, in this Act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:

Sect. 10. Registry of land charges.

For definition of "land charge," see s. 4, *ante*. This definition does not include charges imposed upon premises, in respect of which expenses have been incurred by local authorities, by the Public Health Act, 1875, s. 257; the language of the definition being restricted by the provisions of the present section, so as to include only charges which are the result of a voluntary proceeding on the part of the owner. (*Reg.* v. *Vice-Registrar of Land Registry*, 24 Q. B. D. 178.) The same rule of course applies to such Acts, public and private, as the Water Companies (Regulation of Powers) Act, 1887, 50 & 51 Vict. c. 21, and the Hastings Improvement Act, 48 & 49 Vict. c. 196.

Land Charges &c. Act, 1888, Sect. 10.

(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge :

It is probable that this language will be held to include an equitable tenant for life or in tail.

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

Even when the alterations effected by this part of the Act have come into general operation, it would still be necessary, in order to be perfectly secure, to search in the name of every owner of the land for the longest of the periods allowed by the various Acts authorizing the creation of land charges. This period might easily extend considerably beyond the commencement of the title stipulated to be shown. Such a search, even when possible, would in many cases be as much out of the question practically as a complete search under the old practice. As such charges are a continuing burden, frequently recurring at short intervals, they cannot fail to be known to the owner for the time being, and it is conceived that to suppress them on a sale or mortgage would be a misdemeanour under 22 & 23 Vict. c. 35, s. 24, and 23 & 24 Vict. c. 38, s. 8.

Sect. 11. Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this Act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Sect. 12. Protection of purchasers against unregistered charges.

12. A land charge created after the commencement of this Act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land

charge is registered in the register of land charges in the manner mentioned in this Act.

Land Charges &c. Act, 1888, Sect. 12.

The language at the end of this section is copied from 1 & 2 Vict. c. 110, s. 19, and is, to say the least, susceptible of the interpretation, that by a registration subsequent to the purchase, the charge will be revived as against the purchaser. As Lord Selborne, then at the bar, argued in *Hargrave* v. *H.*, 23 Beav. 484, at p. 485:—"This merely suspends its operation 'until' that act is done, but when registered, it has relation to the date." The Courts will probably adopt the device suggested by Lord Romilly in *Hargrave* v. *H.*, *supra*, for evading this effect; otherwise this part of the Act will prove a mere trap for purchasers, instead of a protection to them.

This language has not been repeated in s. 13, *infra*.

The section omits to provide for the case of a purchaser who has purchased with express notice of an unregistered land charge. It is conceived that the principle of *Le Neve* v. *Le N.*, 3 Atk. 646, Ambl. 436, will be held to apply. (See also notes thereon, 2 Wh. & Tu. L. C.)

13. After the expiration of one year from the first assignment by act inter vivos, occurring after the commencement of this Act, of a land charge created before the commencement of this Act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this Act prior to the completion of the purchase.

Sect. 13. Non-registered land charge existing at commencement of this Act.

See note on s. 12, *supra*.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Sect. 14. Vacation of entry.

This section did not enable the registration of writs to be vacated. (*Cook* v. *C.*, 15 P. D. 116.) But see now S. L. Act, 1890, s. 19, p. 339, *ante*.

PART V.—SUPPLEMENTAL.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this Act.

Sect. 15. Index to registers.

Land Charges &c. Act, 1888, Sect. 16.

Searches.

16. Any person may search in any register or index kept in pursuance of this Act on paying the presented [*sic*] fee.

The word "presented" seems to be a mistake for "prescribed."

Sect. 17.
Official searches.

45 & 46 Vict. c. 39.

44 & 45 Vict. c. 41.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to [*sic*] the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this Act in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges, in the same manner as if this Act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881.

See notes on Conv. Act, 1882, s. 2, p. 182, *ante*.

Sect. 18.
General rules.

18. The Lord Chancellor may at any time after the passing of this Act, and from time to time, with the concurrence of the Commissioners of Her Majesty's Treasury as to fees, make such general rules as may be required for carrying this Act into effect.

THE

LAND CHARGES ACT, 1900.

(63 & 64 Vict. c. 26.)

An Act to amend the Law relating to Charges on Land and to matters connected therewith.

[30th July 1900.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Sect. 1. Transfer to Land Registry Office of business relating to the registry of judgments.

1.—(1.) The business of the registrar of judgments hitherto conducted in the central office of the Supreme Court shall be conducted in the Office of Land Registry, and the Lord Chancellor may by order provide for transferring to the Office of Land Registry such officers as may be required for conducting that business, and such books and papers as may be needed in connexion therewith, and for carrying out any arrangements incidental to or consequential on the transfer, and for abolishing the office of registrar of judgments.

(2.) Provided that nothing in this section shall apply to the registry of Scotch and Irish judgments established under the Judgments Extension Act, 1868, and the Inferior Courts Judgments Extension Act, 1882, or any Act amending the same.

31 & 32 Vict. c. 54. 45 & 46 Vict. c. 31.

(3.) This section shall come into operation on such day as the Lord Chancellor at any time after the passing of this Act may by order direct.

Sect. 2. Closing of register of judgments.

2.—(1.) A judgment or recognizance, whether obtained or entered into on behalf of the Crown or

Land Charges Act, 1900, Sect. 2.

otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section five of the Land Charges Registration and Searches Act, 1888.

51 & 52 Vict. c. 51.

(2.) This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment.

(3.) Except under an order of the High Court, no entry shall be made in any register kept under sections nineteen and twenty-one of the Judgments Act, 1838, section eight of the Judgments Act, 1839, the Law of Property Amendment Act, 1860, the Judgments Act, 1864, or the Crown Suits, &c. Act, 1865.

1 & 2 Vict. c. 110.
2 & 3 Vict. c. 11.
23 & 24 Vict. c. 38.
27 & 28 Vict. c. 112.
28 & 29 Vict. c. 104.

Sect. 3. Amendments of 51 & 52 Vict. c. 51.

3. Section six of the Land Charges Registration and Searches Act, 1888, shall apply to every writ and order affecting land issued or made by any court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of this Act, and to every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto.

Sect. 4. 7 Anne c. 20 not to apply to certain charges.

4. From and after the passing of this Act the Middlesex Registry Act, 1708, shall not apply to any instrument made after the passing of this Act and capable of registration under this Act or the Land Charges Registration and Searches Act, 1888.

Sect. 5. Repeal.

5. As from the commencement of this Act the enactments specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Extent, commencement, short title, and construction.

6.—(1.) This Act shall not extend to Scotland or Ireland.

(2.) This Act shall, except as otherwise expressly provided, come into operation on the first day of July one thousand nine hundred and one.

(3.) This Act may be cited as the Land Charges Act, 1900, and shall be construed as one with the Land Charges Registration and Searches Act, 1888.

51 & 52 Vict. c. 51.

SCHEDULE.

Schedule.

Enactments Repealed.

Section 5.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
1 & 2 Vict. c. 110	The Judgments Act, 1838.	Section nineteen, and section twenty-one, from the words "Provided always" to "one shilling."
2 & 3 Vict. c. 11 .	The Judgments Act, 1839.	Sections two, three, five, six, eight, and nine, and section four, except so far as it applies to lis pendens.
3 & 4 Vict. c. 82 .	The Judgments Act, 1840.	Section two.
18 & 19 Vict. c. 15	The Judgments Act, 1855.	Section two, from "But no judgment" to the end of the section; section three, except so far as it relates to lis pendens; and sections four to eight.
23 & 24 Vict. c. 38	The Law of Property Amendment Act, 1860.	Sections one to five.
27 & 28 Vict. c. 112	The Judgments Act, 1864.	Sections one, two, and three, and, in section four, the words "and whose writ or other process of execution shall be duly registered."
28 & 29 Vict. c. 104	The Crown Suits, &c. Act, 1865.	Sections forty-eight and forty-nine.
51 & 52 Vict. c. 51	The Land Charges Registration and Searches Act, 1888.	Proviso (*a*) of section six.

THE

VOLUNTARY CONVEYANCES ACT, 1893.

(56 & 57 Vict. c. 21.)

An Act to amend the Law relating to the Avoidance of Voluntary Conveyances.

[29th June, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Sect. 1. Short title.

1. This Act may be cited as the Voluntary Conveyances Act, 1893.

Sect. 2. Voluntary conveyances if bonâ fide not to be avoided under 27 Eliz. c. 4.

2. Subject as hereinafter mentioned no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made bonâ fide and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act twenty-seven Elizabeth, chapter four, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.

It is well known that, by a forced construction of 27 Eliz. c. 4, s. 2, a sale and conveyance of lands, tenements, or hereditaments for valuable consideration, made subsequently to a voluntary settlement (or other voluntary conveyance) executed by the same person, was, to the extent of the estate comprised in such sale

and conveyance, held to defeat the limitations and provisions of the settlement: the mere fact of a subsequent sale for value being accepted as conclusive evidence that at the date of the settlement an intent to deceive the subsequent purchaser had been present to the mind of the settlor, constituting fraud and covine within the meaning of the Act. This principle was extended to settlements of copyholds. But the Courts, astutely opposing one extravagance to another, held that it did not extend to settlements of leaseholds, upon the ground that acceptance of the liabilities thereto annexed constituted a consideration. (*Price* v. *Jenkins*, 5 Ch. D. 619.) This case has been dissented from in Ireland. (*Lee* v. *Mathews*, 6 L. R. Ir. 530.) But, though much canvassed, it has never been overruled in England. (*Per* Kekewich, J., in *Harris* v. *Tubb*, 42 Ch. D. 79, at p. 81.) The doctrine is now confirmed and extended to all estates and interests by this section.

Vol. Conv. Act, 1893, Sect. 2.

3. This Act does not apply in any case in which the author of a voluntary conveyance of any lands, tenements, or hereditaments has subsequently, but before the passing of this Act, disposed of or dealt with the same lands, tenements, or hereditaments to or in favour of a purchaser for value.

Sect. 3. Saving transactions completed before passing of Act.

4. The expression "conveyance" includes every mode of disposition mentioned or referred to in the said Act of Elizabeth.

Sect. 4. Definition of conveyance.

The words are:—"Everie conveiance, graunt, charge, lease, estate, incombrance, and limitation of use or uses, of in or out of any landes, tenementes, or other hereditamentes whatsoever."

5. This Act shall extend to Ireland, and, as applied to Ireland, shall be read and construed as if the Act of the tenth year of Charles the First, session two, chapter three (Ireland), were substituted for the said Act of Elizabeth.

Sect. 5. Application to Ireland.

THE

LAND TRANSFER ACT, 1897.

(60 & 61 Vict. c. 65.)

An Act to establish a Real Representative, and to amend the Land Transfer Act, 1875.

[6th August, 1897.]

38 & 39 Vict. c. 87.

Whereas it is expedient to establish a real representative, and to amend the Land Transfer Act, 1875, in this Act referred to as "the principal Act":

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Part I.—*Establishment of a Real Representative.*

Sect. 1. Devolution of legal interest in real estate on death.

1.—(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2.) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4.) The expression "real estate," in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case

in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

L. T. Act, 1897, Sect. 1.

(5.) This section applies only in cases of death after the commencement of this Act.

The Act does not bind the Crown, therefore the legal estate in escheated land does not vest under s. 1 in the Crown's nominee. (*Re Hartley*, 1899, P. 40; and see *Re Ball*, W. N. 1902, p. 226.) Nor does it make estate duty payable in respect of real estate a "testamentary expense" within the meaning of a direction in the will and payable out of personal estate. (*Re Sharman*, 1901, 2 Ch. 280; *Re Spencer Cooper*, *Poë* v. *Spencer Cooper*, 1908, 1 Ch. 130.)

It has been held by North, J., that until a legal personal representative is appointed the real estate vests in the heir-at-law. (*John* v. *John*, 1898, 2 Ch. 576.) *Sed quære* whether this would be so where executors are appointed by the will. The title of an administrator relates back to the death though it does not exist till the grant. (*Re Pryse*, 1904, P. 301.)

Where a mortgagor dies intestate the equity of redemption vests in his administrator, and the heir-at-law need not be made a defendant to a foreclosure action. (*Re Harrowby and Paine*, W. N. 1902, p. 137.)

An equitable estate in copyholds devolves upon the legal personal representative of the owner under the section. (*Re Somerville and Turner*, 1903, 2 Ch. 583.)

The universal devisee and legatee of a will in which no executor is named is entitled to administration with the will annexed, but not to probate according to the tenor of the will, and the practice of the Probate Court has not been altered by the Act. (*Re Pryse*, 1904, P. 301.)

Sect. 2. Provisions as to administration.

2.—(1.) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

(2.) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties,

L. T. Act, 1897, Sect. 2.

and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

Personal representatives means those who are named as executors in a will, whether they have proved or not; consequently the concurrence of all the executors, whether or not they have proved the will, is necessary to effect a valid conveyance of the testator's real estate. (*Re Pawley and London and Provincial Bank's Contract*, 1900, 1 Ch. 58.)

Where the will appoints general executors and special executors for property situate abroad, the general executors may sell the real estate in this country without the concurrence of the special executors. (*Re Cohen's Executors and L.C.C.*, 1902, 1 Ch. 187.)

"The Court" in s. 2 (2) does not mean only the senior judge of the Chancery Division. (*Re Walbeck*, W. N. 1904, p. 204.)

(3.) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

The Act has not altered the settled practice that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that real estate. (*Re Jones, Elgood* v. *Kinderley*, 1902, 1 Ch. 92.) Consequently the costs of an inquiry as to the testator's heir-at-law are borne by the realty, although the Act makes these testamentary expenses, and the will may contain a general direction that testamentary expenses are to be paid out of personalty. (*Re Betts, Doughty* v. *Walker*, 1907, 2 Ch. 149.)

But where the costs of a probate action are directed to be paid "out of the estate," and the personal estate is insufficient, they are now payable out of the realty (*Re Vickerstaff, V.* v. *Chadwick*, 1906, 1 Ch. 762), the effect of the Act being to

L. T. Act, 1897, Sect. 2.

get rid of the former rule which gave the Probate Division no jurisdiction over the real estate, as laid down in *Re Shaw*, *Bridges* v. *Shaw*, 1894, 3 Ch. 615.

Although the Act has rendered unnecessary an express charge of debts on real estate, it has not affected the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts, and the personalty is exhausted in paying debts. (*Re Kempster*, 1906, 1 Ch. 446.)

The Act does not confer upon the personal representative a new right of retainer or priority in respect of real assets. (*Re Williams*, *Holder* v. *Williams*, 1904, 1 Ch. 52.)

See *Cary and Lott's Contract*, *infra*.

(4.) Where a person dies possessed of real estate the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Sect. 3. Provision for transfer to heir or devisee.

3.—(1.) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

Where a conveyance was made to the devisee subject to a charge of any money which the personal representatives of the testator were liable to pay, all claims having been paid of which notice had been received, a purchaser from the devisee was not entitled to an indemnity against any claim that might thereafter be made. (*Cary and Lott's Contract*, 1901, 2 Ch. 463.)

The personal representative is entitled to assent to a devise

L. T. Act, 1897, Sect. 3.

in preference to executing a conveyance. (*Re Pix, Plomley* v. *Stileman*, W. N. 1901, p. 165.) As to form of assent, see *S. C.* No stamp is required. (*Kemp* v. *Commrs. of Inland Revenue*, 1905, 1 K. B. 581.)

(2.) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4.) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorize the registrar to register the person named in the assent as proprietor of the land.

Sect. 4. Appropriation of land in satisfaction of legacy or share in estate.

4.—(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested

in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court.

L. T. Act, 1897, Sect. 4.

This sub-section has not taken away from executors and trustees the power of appropriation which existed before the Act, at all events in cases where there is a trust for sale and conversion. (*Re Beverly, Watson* v. *Watson*, 1901, 1 Ch. 681.)

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land.

5. Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

Sect. 5. Liability for duty.

Part II.—*Amendments of the Land Transfer Act*, 1875.

6.—(1.) Settled land may (at the option of the tenant for life) be registered either in the name of the tenant for life, or, where there are trustees with powers of sale, in the names of those trustees, or, where there is an overriding power of appointment of the fee simple, in the names of the persons in whom that power is vested.

Sect. 6. Settled land.

(2.) There shall also be entered on the register such restrictions or inhibitions as may be prescribed, or may be expedient, for the protection of the rights of the persons beneficially interested in the land.

(3.) Where land already registered is assured to the uses of a settlement, the instrument of transfer may be in a specially prescribed form, which shall operate as a conveyance to the uses of the settlement, and it shall be the duty of the trustees

L. T. Act, 1897, Sect. 6.

of the settlement (if any) to concur in the instrument, and to apply for the entry on the register of the proper restrictions or inhibitions under this section. If there are no such trustees, the registrar shall inquire into the terms of the settlement, and shall enter on the register such restrictions or inhibitions as may be prescribed, or as appear to him to be in accordance with this section.

(4.) On the death of a tenant for life, registered as proprietor of settled land, it shall be the duty of the trustees of the settlement (if any) to apply for the registration of his successor or successors, with such restrictions or inhibitions (if any) as may be in accordance with this section. If the trustees neglect to apply or if there are no such trustees, the registrar shall proceed under the forty-first section of the principal Act in such manner as may be prescribed.

(5.) Where a settlement is created by the will of, or otherwise arises in consequence of the death of, a sole registered proprietor of land or of an undivided share in land, it shall be the duty of his personal representatives to apply for the registration of the person entitled to be registered as proprietor, and for the entry on the register of proper restrictions or inhibitions in accordance with this section.

(6.) The settlement, or an abstract or copy thereof, may be filed in the registry for reference in the prescribed manner, but such filing shall not affect a purchaser or mortgagee for value from the registered proprietor with notice of its provisions, or entitle him to call for production of the settlement, or for any information or evidence as to its contents.

(7.) The registered proprietor of settled land and all other necessary parties (if any) shall, on the request, and at the expense, of any person entitled to an estate, interest, or charge conveyed or created for securing money actually raised at the date of such request, charge the land in the prescribed manner with the payment of the money so raised.

(8.) Subject to the maintenance of the right of the registered proprietor to deal by registered disposition, or by way of mortgage by deposit, with any land whereof he is registered as proprietor, the estates, rights, and interests of the persons for the time being entitled under any settlement comprising the land shall be unaffected by the registration of that proprietor.

(9.) A person in a fiduciary position may apply for, or concur in, or assent to, any registration authorized by this section, and, if he is a registered proprietor, may execute an instrument of transfer or charge in the prescribed form in favour of any person whose registration is so authorized.

(10.) In this section the expressions "tenant for life," "settled land," "settlement," and "trustees of the settlement," have the same meaning as in the Settled Land Acts, 1882 to 1890.

Sect. 7.

7.—(1.) Where any error or omission is made in the register, or where any entry in the register is made or procured by or in

pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided.

L. T. Act, 1897, Sect. 7.

Right to indemnity in certain cases. 38 & 39 Vict. c. 87.

(2.) Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity.

(3.) A person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default, and the omission to register a sufficient caution, notice, inhibition, or other restriction to protect a mortgage by deposit or other equitable interest, or any estate or interest created under section forty-nine of the principal Act, shall be deemed neglect within the meaning of this sub-section.

(4.) Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section.

(5.) The registrar may, if the applicant desires it, and subject to an appeal to the Court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity. In the event of an appeal to the Court, the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the Court shall consider that the appeal is unreasonable.

(6.) Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect, or default.

(7.) A claim for indemnity under this section shall be deemed a simple contract debt, and for the purposes of the Limitation Act, 1623, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his claim. This section shall apply to the Crown in like manner as it applies to a private person.

21 Jac. 1, c. 16.

8.—(1.) So long as a land certificate, office copy of a registered lease, or certificate of charge, is outstanding, it shall be produced to the registrar on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates, and on every registered transmission or rectification of the register, and a note of every such entry, transmission, or rectification shall be officially indorsed on the certificate or office copy, and the registrar shall have the same powers of compelling the production of certificates and office copies as are conferred on him by sections one hundred and nine and one hundred and

Sect. 8.

Land certificates, office copies of registered leases, and certificates of charge.

L. T. Act, 1897, Sect. 8.

ten of the principal Act as to the production of maps, surveys, books, and other documents.

(2.) Where a land certificate or office copy of a registered lease has been issued, the vendor shall deliver it to the purchaser on completion of the purchase, or, if only a part of the land comprised in the certificate or office copy is sold, he shall, at his own expense, produce, or procure the production of, the certificate or office copy in accordance with this section for the completion of the purchaser's registration. Where the certificate or office copy has been lost or destroyed, the vendor shall pay the costs of the proceedings required to enable the registrar to proceed without it.

(3.) A new land certificate, office copy of a registered lease or certificate of charge, shall not be granted by the registrar in place of a former certificate, or office copy, which has been lost or destroyed, unless the applicant has filed with the registrar a statutory declaration and such other evidence, if any, as the registrar may think necessary, stating the fact and circumstances of the loss or destruction of the former certificate or office copy, nor until at least one advertisement of the application in the London Gazette and three advertisements in a London daily morning newspaper shall have been published at intervals of not less than seven days, and three advertisements in a local newspaper circulating in the district in which the land is situate, and such indemnity (if any) given as the registrar shall think fit.

(4.) Where a transfer of land is made by the registered proprietor of a charge, in exercise of the power of sale conferred by the charge, it may be registered, and a new land certificate may be issued to the purchaser, without production of the former land certificate, but the certificate of charge (if any) must be produced or accounted for in accordance with this section. Subject to any stipulation to the contrary the proprietor of a registered charge shall not be entitled to have custody of the land certificate, or to require a land certificate to be applied for :—

(i.) On the first registration of freehold or leasehold land, and on the registration of a charge, a land certificate, office copy of the registered lease, or certificate of charge, as the case may be, shall be prepared, and shall either be delivered to the registered proprietor or deposited in the registry as the said proprietor may prefer ;

(ii.) If so deposited in the registry it shall be officially indorsed from time to time, as in this section provided, with notes of all subsequent entries in the register affecting the land or charge to which it relates ;

(iii.) The registered proprietor may at any time apply for the delivery of the certificate or office copy to himself or to such person as he may direct, and may at any time again deposit it in the land registry ;

(iv.) The preparation, issue, indorsement, and deposit in the registry of the certificate or office copy shall be effected without cost to the proprietor.

L. T. Act, 1897, Sect. 8.

The registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or office copy of registered lease, or certificate of charge; and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title deeds or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage.

Sect. 9. Transfers and charges. 44 & 45 Vict. c. 41.

9.—(1.) The provisions of section eight of the Conveyancing and Law of Property Act, 1881, shall apply, so far as applicable thereto, to transfers of registered land as though such transfers were made by deed, and a transfer of land made by the proprietor of a registered charge with power of sale shall operate as a conveyance in professed exercise of the power of sale conferred by the said Act.

(2.) The provisions of sections nineteen, twenty, twenty-one (except sub-sections one and four), twenty-two, twenty-three, and twenty-four of the same Act, shall similarly apply to registered charges.

(3.) Every registered proprietor of land may in the prescribed manner charge it with an annuity or other periodical payment, and the provisions of the principal Act and this Act with regard to charges shall apply to any such charge. Every registered proprietor of land may charge it, in favour of a building society under the Building Societies Acts, by means of a mortgage made in pursuance of or consistent with the rules of that society, and the mortgage shall be deemed a charge made in the prescribed manner, and shall be registered accordingly.

(4.) Nothing contained in any charge shall (i.) take away from the registered proprietor thereof the power of transferring it by registered disposition or of requiring the cessation thereof to be noted on the register, or (ii.) affect any registered dealing with land or a charge in respect of which the charge is not expressly registered or protected, in accordance with the principal Act and this Act.

(5.) The registrar may, on the application, or with the consent, of the registered proprietor of the land, and of the proprietors of all registered charges (if any) of equal or inferior priority, alter the terms of a charge.

(6.) Where a person on whom the right to be registered as proprietor of land or of a charge has devolved by reason of the death or bankruptcy of the registered proprietor, or has been conferred by an instrument of transfer or charge, in accordance with the principal Act and this Act, desires to transfer or charge the land or to deal with the charge before he is himself registered as proprietor, he may do so in the prescribed manner, and subject to the prescribed conditions. Subject to the pro-

L. T. Act, 1897. Sect. 9.

visions of the principal Act with regard to registered dealings for valuable consideration, a transfer or charge so made shall have the same effect as if the person making it were registered as proprietor.

Sect. 10. Penalty for unqualified persons drawing instruments.

10. Every person who (not being a barrister or duly certificated solicitor, notary public, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument of transfer or charge, or an application to register restrictive conditions, or to alter or discharge, or alter the priority of a registered charge, or any other prescribed instrument, shall incur a fine not exceeding fifty pounds, which shall be recoverable before a Court of Summary Jurisdiction in manner provided by the Summary Jurisdiction Acts.

Provided that this section shall not extend to—

(*a*) any public officer drawing or preparing instruments and applications in the course of his duty; or

(*b*) any person employed merely to engross any instrument or application.

Sect. 11. As to statute of 32 Hen. 8, c. 9.

11. Section two of the statute of the thirty-second year of the reign of Henry the Eighth, chapter nine, which prohibits sales and other dispositions of land of which the grantor or his predecessor in title has not been in possession for one whole year previously to the disposition being made, is hereby repealed.

Sect. 12. As to title by possession.

12. A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly. Provided that where a person would, but for the provisions of the principal Act or of this section, have obtained a title by possession to registered land, he may apply for an order for rectification of the register under section ninety-five of the principal Act, and on such application the Court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the principal Act or this Act, order the register to be rectified accordingly. And provided also, that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

Sect. 13. As to succession and estate duty.

13.—(1.) On every application to register land with an absolute title, or to register a transmission of land, the registrar shall inquire as to Succession Duty and Estate Duty.

(2.) If, on such application, it appears that there is, or is capable of arising, any such liability to Succession Duty or Estate Duty as would affect the purchaser from the person to

be registered as proprietor if the land were unregistered, the registrar shall enter notice of the liability on the register in the prescribed manner.

L. T. Act, 1897, Sect. 13.

(3.) Succession Duty and Estate Duty shall not—

(*a*) unless so noted on the register; or

(*b*) unless in the case of a possessory title the liability to the duty was, at the date of the original registration of the land, subsisting or capable of arising; or

(*c*) unless in the case of a qualified title the liability to the duty was included in the exceptions made on such original registration of the land;

affect a bonâ fide registered purchaser for full consideration in money or money's worth, although he may have received extraneous notice of the liability in respect thereof.

Sect. 14. Repeal in part of 38 & 39 Vict. c. 87, s. 83.

14.—(1.) So much of section eighty-three of the principal Act as prohibits the registration of undivided shares, and limits the number of co-proprietors, and relates to the description, boundaries, and extent, and alteration of the description of registered land is repealed.

(2.) Registered land shall be described in the prescribed manner by means of the ordnance map, together with such further verbal particulars (if any) as the applicant for registration may desire, and the registrar, or the Court, if the applicant prefers, may approve, regard being had to ready identification of parcels, correct description of boundaries, and, as far as may be, uniformity of practice.

Sect. 15. Provisions as to land held by incumbents of benefices. 1 & 2 Vict. c. 23. 2 & 3 Vict. c. 49. 51 & 52 Vict. c. 20.

15.—(1.) Where the incumbent of a benefice and his successors are the registered proprietors of land—

(i.) No disposition thereof shall be registered unless a certificate in the prescribed form shall be obtained—

(*a*) in case of sales under the Parsonages Act, 1838, or the Church Building Act, 1839, or any Acts amending or extending the same respectively, from Queen Anne's Bounty; or

(*b*) in case of sales under the Glebe Lands Act, 1888, or any Acts amending or extending the same, from the Board of Agriculture; or

(*c*) in all other cases, from the Ecclesiastical Commissioners.

(ii.) No lien shall be created by deposit of the land certificate, and an inhibition shall be placed on the register and on the land certificate accordingly.

The production of a certificate from any of the above-mentioned bodies shall be a sufficient authority to the registrar to register the disposition in question, and it shall be the duty of the proper body to grant such certificate in all cases in which the facts admit thereof.

(2.) On the registration of the incumbent of a benefice and his successors as the proprietors of registered land, if it shall be certified by Queen Anne's Bounty, or shall otherwise appear,

L. T. Act, 1897, Sect. 15.

that such land was originally purchased by Queen Anne's Bounty or was otherwise appropriated or annexed by or with the consent or the concurrence of Queen Anne's Bounty to the benefice for the augmentation thereof, the registrar shall enter a note to that effect on the register.

(3.) Where the incumbent of a benefice is entitled to indemnity under the provisions of this Act, the money shall be paid to Queen Anne's Bounty and appropriated by them to the benefice.

(4.) The term "benefice" in this section shall comprehend all rectories with cure of souls, vicarages, perpetual curacies, donatives, endowed public chapels and parochial chapelries, and chapelries or districts belonging, or reputed to belong, or annexed, or reputed to be annexed, to any church or chapel.

Sect. 16. Provisions as to vendor and purchaser on sales.

16.—(1.) A purchaser of registered land shall not require any evidence of title, except—

(i.) the evidence to be obtained from an inspection of the register or of a certified copy of, or extract from, the register;

(ii.) a statutory declaration as to the existence or otherwise of matters which are declared by section eighteen of the principal Act and by this Act not to be incumbrances;

38 & 39 Vict. c. 87.

(iii.) if the proprietor of the land is registered with an absolute title, and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to those incumbrances, or evidence of their discharge from the register;

(iv.) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration as a purchaser would be entitled to if the land were unregistered;

(v.) if the land is registered with a possessory title, such evidence of the title subsisting or capable of arising at the first registration of the land as the purchaser would be entitled to if the land were unregistered.

(2.) Where the vendor of registered land is not himself registered as proprietor of the land or of a charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser.

(3.) In the absence of special stipulation, a vendor of land registered with an absolute title shall not be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title shall only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under section seven of the Conveyancing and Law of Property Act, 1881, shall be construed accordingly.

44 & 45 Vict. c. 41.

17.—(1.) The registered proprietor of land not situated in a district where the registration of title is compulsory, may, with the consent of the other persons (if any) for the time being appearing by the register to be interested therein, and on delivering up the land certificate or office copy of the registered lease and certificates of charge (if any), remove the land from the register.

L. T. Act, 1897. Sect. 17.

Power to remove land from the register.

(2.) After land is removed from the register no further entries shall be made respecting it, and inspection of the register may be made and office copies of the entries therein may be issued, subject to such regulations as may be prescribed.

(3.) If the land so removed from the register is situate within the jurisdiction of the Middlesex or Yorkshire registries named in section one hundred and twenty-seven of the principal Act, it shall again be subject to such jurisdiction as from the date of the removal.

38 & 39 Vict. c. 87.

18. The principal Act shall be further amended in regard to its minor details in the manner set forth in the First Schedule hereto.

Sect. 18. Minor amendments in Schedule I.

19.—(1.) Where a county council apply in pursuance of section ten of the Small Holdings Act, 1892, for registration as proprietors of land, they may be registered as proprietors of that land, with any such title as is authorized by the principal Act.

Sect. 19. Registration of small holdings.

(2.) Where a county council, after having been so registered, transfer any such land to a purchaser of a small holding, the purchaser shall be registered as proprietor of the land with an absolute title, subject only to such incumbrances as may be created under the Small Holdings Act, 1892, and in any such case the remedy of any person claiming by title paramount to the county council in respect either of title or incumbrances shall be in damages only, and such damages shall be recoverable against the county council.

55 & 56 Vict. c. 31.

PART III.—*Compulsory Registration and Insurance Fund.*

20.—(1.) Her Majesty the Queen may, by Order in Council, declare, as respects any county or part of a county mentioned or defined in the Order, that, on and after a day specified in the Order, registration of title to land is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day so specified, acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land.

Sect. 20. Power to require registration of title on sale.

(2.) In this section the expression "conveyance on sale" means an instrument executed on sale by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of land may be made under the principal Act.

38 & 39 Vict. c. 87.

(3.) The title with which a proprietor of freehold land is registered in pursuance of this section shall be not less than

L. T. Act, 1897, Sect. 20.

a possessory title; but nothing in this section shall prevent any person from being registered with any other title if the registrar is satisfied of his title.

(4.) It shall be lawful for Her Majesty in Council to revoke or vary any Order made under this section.

(5.) In the case of every Order proposed to be made under this section, notice shall, six months before the Order is made, be given to the council of the county to which such Order is proposed to be applied. A draft of the proposed Order, together with the name of at least one place within or conveniently near to the county where a district registry office will be established, shall accompany the notice, and shall also be published in the Gazette.

(6.) If within three months after receipt of the draft the county council, at a meeting specially called for the purpose, at which two-thirds of the whole number of the members shall be present, resolve, and communicate to the Privy Council their resolution, that in their opinion compulsory registration of title would not be desirable in their county, the Order shall not be made.

(7.) The first Order made under this section shall not affect more than one county.

(8.) Except as to a county or part of a county which shall have signified through the county council of such county, pursuant to a resolution of such council passed at a meeting at which two-thirds of the whole number of the members shall be present, its desire that registration of title shall be compulsorily applied to it, no further Order shall be made under this section, and in any case no further Order shall be made under this section until the expiration of three years from the making of the first Order. Provided that in the case of an Order made under this sub-section the provisions of sub-section (6) shall not apply.

(9.) Every Order of Council made under this section shall, within thirty days from the date thereof, if Parliament be then sitting, or within twenty days from the commencement of the next session, if Parliament be not sitting, be laid on the table of both Houses of Parliament, and if within forty days of any Order being so laid an address in either House disapproving of such Order be carried, such Order shall be void and of no effect.

(10.) Any Order made under this section shall be made with due regard to the utilization (if practicable) of any land registry existing in the county to which compulsory registration is proposed to be applied or in any adjoining county.

51 & 52 Vict. c. 41.

(11.) For the purposes of this section the word county shall have the same meaning as in the Local Government Act, 1888, and shall include a county borough; and the word county council shall include the council of such borough.

(12.)—(i.) In the event of any portion of a county or part of a county as regards which an Order has been made under this section being included in another county or in a county borough as regards which no Order has been made under this section,

such Order shall cease to be in force within such included portion of the county.

L. T. Act, 1897, Sect. 20.

(ii.) In the event of any portion of a county or part of a county as regards which no Order has been made under this section being included in another county or in a county borough as regards which an Order has been made under this section, such Order shall apply to such included portion of the county.

Sect. 21. Insurance fund for providing indemnity.

21.—(1.) For the purpose of providing indemnity payable under this Act, there shall be established an insurance fund to be raised by setting apart at the end of each financial year such portion of the receipts from fees taken in the land registry as the Lord Chancellor and the Treasury shall by order determine.

(2.) The insurance fund shall be invested in such names and manner as the Treasury from time to time direct.

(3.) If the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon, the deficiency shall be charged on and paid out of the Consolidated Fund of the United Kingdom, or the growing produce thereof; but any sum so paid out of the Consolidated Fund, or the growing produce thereof, shall be repaid out of the money subsequently standing to the credit of the insurance fund.

(4.) Accounts of the fund shall be kept, and be audited as public accounts, in accordance with such regulations as the Treasury from time to time make.

PART IV.—*Miscellaneous.*

Sect. 22. Rules and fee orders.

22.—(1.) Regulations may be made by the Lord Chancellor, under section one hundred and six of the principal Act, altering or adding to the official styles of the registrar and other officers of the registry, for the purposes of this Act.

(2.) General rules under section one hundred and eleven of the principal Act shall be made by the Lord Chancellor with the advice and assistance of the registrar, a judge of the Chancery Division of the High Court to be chosen by the judges of that division, and three other persons, one to be chosen by the General Council of the Bar, one by the Board of Agriculture, and one by the Council of the Incorporated Law Society.

(3.) Orders under section one hundred and twelve and one hundred and twenty-two of the principal Act shall be made by the Lord Chancellor with the advice and assistance of the same persons, and with the concurrence of the Treasury.

(4.) The fee orders relating and incidental to registration of title shall be arranged from time to time so as to produce an annual amount sufficient to discharge the salaries and other expenses (including the annual contribution to the insurance fund) incidental to the working of the principal Act and this Act, and no more.

38 & 39 Vict. c. 87.

L. T. Act, 1897, Sect. 22.

(5.) Subject to any alterations that may be made in accordance with sections one hundred and twelve and one hundred and twenty-two of the principal Act and this section, the fees to be charged in districts where registration of title is compulsory shall, as regards the matters mentioned in the Second Schedule hereto, be as therein set forth.

(6.) Provision may be made by general rules, under section one hundred and eleven of the principal Act, as amended by this Act, for carrying this Act into effect, and in particular for the following purposes:—

(*a*) For carrying out the provisions of this Act with respect to compulsory registration;

(*b*) For adapting to the registration of proprietors of leasehold land the provisions of the principal Act, as to absolute and possessory titles, and as to land certificates;

(*c*) For adapting to sub-mortgages and to incumbrances prior to registration the provisions of the principal Act with regard to charges;

(*d*) For the conduct of official searches against cautions, inhibitions, and such matters of a like nature as may be prescribed, and for enabling the registered proprietor to apply for such searches by telegraph, and for returning the replies in like manner to him or to such other person as he may direct;

(*e*) For enabling cautions to be entered against the registration of possessory and qualified titles as qualified or absolute;

(*f*) For enabling a mortgagee by deposit to give notice to the registrar by registered letter or otherwise of the deposit with him of the land certificate, office copy of the registered lease, or certificate of charge. Provided that the fee for the entry of any such notice shall not exceed one shilling;

(*g*) For applying to the grant of leases and dealings with leasehold land the provisions of this Act with respect to compulsory registration;

(*h*) For allowing the insertion, inserting in the register, and in land certificates, of the price paid or value declared on first registrations, transfers, and transmissions of land; and

(*i*) For regulating any such matters as are authorized by this Act to be prescribed.

(7.) Provided that nothing in the rules under the said section shall extend to allow the inspection of any entry in the register, except by or under the authority of some person interested in the land or charge to which the entry refers.

(8.) Provision may be made by general orders under section one hundred and eighteen of the principal Act for modifying the provisions of that Act with respect to the formation and constitution of district registries, and for providing the mode in which district registrars are to be remunerated; but nothing in any such order shall affect the provisions as to qualification contained in section one hundred and nineteen of the principal Act.

L. T. Act, 1897, Sect. 23.

Provision for the Yorkshire registries of deeds.

54 & 55 Vict. c. 64.

23.—(1.) At any time after the passing of this Act, and subject to the provisions of section twenty of this Act, the Lord Chancellor may enter into an agreement with the county council of any of the three ridings of Yorkshire for the transfer of the business of the local deed registry established in that riding to the office of land registry.

(2.) The agreement shall be drawn up in accordance with the principles of sections one, three, and four of the Land Registry (Middlesex Deeds) Act, 1891, which provided for the transfer of the Middlesex registry of deeds to the land registry, and shall, after approval by the Treasury, take effect accordingly.

(3.) The whole of the property, assets, and liabilities of the county council, in relation to the local registry, shall be included in the transfer, and shall be taken over by the State at a price to be specified in or ascertained under the terms of the agreement, but no sum shall be payable for compensation in respect of any future loss of fees consequent upon such transfer.

(4.) Unless and until an agreement as aforesaid is concluded the county council may from time to time, at intervals of five years, in the event of their suffering loss, owing to the business of the local registry being diminished by reason of the principal Act and this Act, apply to the Treasury for compensation, and the Treasury shall award such compensation accordingly.

(5.) The compensation shall be made by the payment of a capital sum to the county fund to be determined in case of dispute by arbitration in the usual way on the basis of the receipts and expenditure in respect of the local registry during the three years previous to the claim being made, and that the county fund shall not be placed in a worse financial position by the operation of the Act.

(6.) All payments under this section shall be made out of moneys to be provided by Parliament.

Sect. 24. Interpretation.

24.—(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such.

(2.) In this Act the expression "personal representative" means an executor or administrator.

Sect. 25. Commencement of Act.

25. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.

Sect. 26. Short title and construction.

26. This Act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal Act, and that Act and this Act may be cited together as the Land Transfer Acts, 1875 and 1897.

L. T. Act, 1897, Sched.

Section 18.

SCHEDULES.

THE FIRST SCHEDULE.

Minor Amendments of the Principal Act.

The sections of the principal Act mentioned in the first column of this Schedule are repealed or amended to the extent and in the manner set forth in the third column.

1. Section in Principal Act.	2. Subject Matter.	3. Extent of Repeal or Nature of Amendment.
2	Only land of freehold tenure to be registered.	If, at any time, land is found to have been registered with absolute or qualified title contrary to the provisions of this section, the registration shall not be annulled, but shall be deemed an error not capable of rectification under the principal Act, and any person suffering loss thereby shall be indemnified accordingly.
11	Registration of leasehold land.	A sub-lease shall, and a term created for mortgage purposes shall not, be deemed a lease within the meaning of this section.
18	Various rights and liabilities not to be incumbrances.	This section shall include estate duty, liability to repair the chancel of any church, liability in respect of embankments, sea and river walls, and drainage rights, customary rights, public rights, and profits à prendre, and, subject to the provisions of this Act, rights acquired or in course of being acquired under the limitation Acts.
18 (4) (5)	Rights to and in respect of mines and minerals not to be incumbrances.	These sub-sections shall apply only to rights created previously to the registration of the land or the commencement of this Act.
18, last paragraph.	Power for registrar to note on the register the existence of liabilities mentioned in the section.	The power conferred on the registrar shall be exercised in all cases where the abstract of title on first registration or on registration as qualified or absolute discloses the existence of any such liabilities as are mentioned in sub-sections (4) and (5). Where an easement is registered as an incumbrance, the dominant and servient tenements shall be defined, if practicable and required by the parties. Notice of a power of re-entry and of a right of reverter may be entered on the register under this paragraph.
19 & 28, second paragraph.	Discharge of incumbrances created prior to the registration of the land, and of registered charges.	These sections shall apply to part discharges.

1. Section in Principal Act.	2. Subject Matter.	3. Extent of Repeal or Nature of Amendment.
21	No acquisition of title by adverse possession.	Repealed.
22	Creation of charges ...	Charges created under this section are subject to the provisions of the principal Act in respect of qualified or possessory titles.
30—33 and 35—38.	Effect of transfers of freehold and leasehold land.	In the absence of anything to the contrary in the register, or in the transfer, or (in the case of leasehold land) in the lease, the word "land" in these sections includes the mines and minerals if parcel thereof.
40	Transfer of charges ...	A registered transferee for value of a charge, and his successors in title, shall not be affected by any irregularity or invalidity in the original charge itself, of which the transferee was not aware when it was transferred to him.
43	Transmission on bankruptcy.	This section shall not apply until it is certified in the prescribed manner by the Court having jurisdiction in bankruptcy that the land or charge is part of the property of the bankrupt divisible amongst his creditors. The official receiver shall be entitled to be registered pending the appointment of a trustee.
44, 45, 83 (4).	As to married women...	These sections shall not apply to the case of any woman married on or after 1st January, 1883, or to any property to which a married woman is entitled for her separate use.
49	General powers of disposition over land.	This section includes power to sever the mines and minerals from the surface.
50	Notice of leases.....	The words "made subsequently to the last transfer of the land on the register" are repealed.
58	Registration of restrictions.	The words "for his own sake, or at the request of some person beneficially interested in such land" are repealed, and the section shall apply to charges as well as to land.
66	Notices to the Board of Trade and others on registration of foreshore.	This section shall not apply to registration with a possessory title.
72	Title deeds to be marked with notice of registration.	In the case of registration with a possessory title, the registrar may act on such reasonable evidence as may be prescribed as to the sufficiency of the documents produced, and as to dispensing with their production in special circumstances.
78	Loss or destruction of land certificate.	Repealed.
81	Effect of deposit of land certificate.	Repealed

L. T. Act, 1897, Sched.

1. Section in Principal Act.	2. Subject Matter.	3. Extent of Repeal or Nature of Amendment.
82, first paragraph.	Registration of advowsons and other incorporeal hereditaments.	The words "enjoyed in gross" are repealed.
83 (1)	Notices of trusts.....	Repealed, and the following sub-section substituted :—Neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust, express, implied, or constructive ; and references to trusts shall, as far as possible, be excluded from the register.
83 (2)	Undivided shares and joint proprietors.	Repealed.
83 (3)	Entry of no survivorship of joint proprietors.	The words "with their consent" are repealed, and the following words and further provision are added to this sub-section : — "or of the registrar, after inquiry into title, subject to an appeal to the Court. "Subject to general rules, wherever registered land or a charge is to be entered in the names of two or more joint proprietors, the registrar shall make such entry under this sub-section as may be prescribed, unless it is shown to his satisfaction that the joint proprietors are entitled for their own benefit."
83 (5 and 6).	Description boundaries and extent of registered land.	Repealed.
84	Annexation of conditions to land.	Conditions may be annexed to land at any time, and the section shall apply to any restrictive condition capable of affecting assigns by way of notice.
126	Transfer of titles from the 1862 register.	The words "nevertheless it shall not be obligatory on any person interested in an estate registered under the said Land Registry Act, 1862, to cause such estate to be registered under this Act" are repealed.
127	Registered land to be exempt from Middlesex and Yorkshire registries.	The section shall not apply to estates and interests excepted from the effect of registration under a possessory or qualified title, or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land.

THE SECOND SCHEDULE.

L. T. Act, 1897, Sched.

Section 22.

The following fees shall be paid in districts where registration of title is compulsory, and shall include all necessary surveying, mapping, and scrivenery, and the preparation, issue, endorsement, or deposit, as the case may be, of a land certificate, office copy, registered lease, or certificate of charge; discharges of incumbrances, the registration of any necessary cautions, inhibitions or restrictions, the filing of auxiliary documents (if any), and all other necessary costs of and incidental to the completion of each registration or transaction, whether under one or under several titles.

For possessory registration, and for transfers, charges, and transfers of charges for valuable consideration:—

Value.	Fees.
Not exceeding 1,000*l.*	1*s.* 6*d.* for every 25*l.* or part of 25*l.*
Exceeding 1,000*l.* and not exceeding 3,000*l.*	3*l.* for the first 1,000*l.*, and 1*s.* for every 25*l.* or part of 25*l.* over 1,000*l.*
Exceeding 3,000*l.* and not exceeding 10,000*l.*	7*l.* for the first 3,000*l.*, and 1*s.* for every 50*l.* or part of 50*l.* over 3,000*l.*
Exceeding 10,000*l.*	14*l.* for the first 10,000*l.*, and 1*s.* for every 100*l.* or part of 100*l.*, up to a maximum of 25*l.* for 32,000*l.*

For transmissions and transfers not for value, notices of leases, and rectification of the register, and land:—

One quarter of the above fees, according to the capital value of the interest dealt with, with a minimum of 1*s.* and a maximum of 5*l.*

No fees to be charged for inspection of the register.

APPENDICES.

APPENDIX I.

RULES RELATING TO THE FOREGOING ACTS.

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APPENDIX I.

RULES

Under the Act for the Abolition of Fines and Recoveries, and Section 7 of the Conveyancing Act, 1882.

1. No person authorized or appointed under the Act 3 & 4 Will. 4, c. 74 (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgment of deeds by married women, shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband, and from the solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment:—

(Signed) *A. B.*

A judge of the High Court of Justice in England,

or, A judge of the county court of

or, A perpetual commissioner for taking acknowledgments of deeds by married women

or, The special commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

Charges under the Act 3 *&* 4 *Will.* 4, *c.* 74 (*the Fines and Recoveries Act*).

	£	*s.*	*d.*
For the indorsements on deeds required by the Fines and Recoveries Act, to be entered on the court rolls of manors, of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5*s.*, together .	0	10	0
For the entries on the court rolls of deeds and the indorsements thereon, at per folio of 72 words	0	0	6

	£	*s.*	*d.*
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders or the memorandums thereof in the court rolls, at per folio of 72 words . .	0	0	6

[*Rule* 9 *repeals former Orders.*]

10. These rules shall take effect from and after the 31st December, 1882.

RULES

Under Section 2 of the Conveyancing Act, 1882.

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

RULE

Under the Conveyancing and Law of Property Act, 1881.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the office.

APPENDIX

To Rules relating to the Conveyancing Acts, 1881, 1882.

Form I.

Declaration by Separate Instrument as to Purposes of Search.

Supreme Court of Judicature,
Central Office.
To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

I declare that the search [*or* searches] in the name [*or* names] of required to be made by the requisition for search, dated the is [*or* are] required for the purposes of a sale [*or* mortgage, *or* lease, *or as the case may be*], by A. B. to C. D.

Signature,
Address, and
Description.

Dated

Form II.

Declaration as to Purposes of Search contained in the Requisition.

I declare that the above-mentioned search is required for the purposes of a sale [*or* mortgage, *or* lease, *or as the case may be*], by A. B. to C. D.

Form III.

Requisition for Search in the Enrolment Office under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Clerk of Enrolments,
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for

deeds and other documents enrolled during the period from 18 , to 18 , both inclusive, in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM IV.

Requisition for Search in the Bills of Sale Department under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Bills of Sale,
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 , to 18 , both inclusive, in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM V.

Requisition for Search in the Registry of Certificates of Acknowledgments of Deeds by Married Women under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women.
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by Married Women during the period from 18 , to 18 , both inclusive, according to the particulars mentioned in the schedule thereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM VI.

Requisition for Search in the Registry of Judgments under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and lis pendens, and for

judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 , to 18 , both inclusive, and for executions for the period from the 29th July, 1864 [*or as the case may require*] to the 18 , both inclusive, and for annuities for the period from the 26th April, 1855 [*or as the case may require*] to the 18 , both inclusive, in the following name [*or* names]

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM VII.

Certificate of Search by Enrolment Department under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office,
Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name [*or* names] of for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name [*or* in any one or more of those names] during the period aforesaid,

or and that except the described in the schedule hereto no deed or document has been enrolled in that name [*or* in any one or more of those names] during the period aforesaid.

THE SCHEDULE.

Dated

FORM VIII.

Certificate of Search by the Registrar of Bills of Sale under the Conveyancing Act, 1882.

Supreme Court of Judicature,
Central Office,
Bills of Sale Department.
Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.
In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name [*or* names] of for the period from 18 , to 18 , both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during that period,
or, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during the period aforesaid.

THE SCHEDULE.

Dated

———

FORM IX.

Certificate of Search by Registrar of Certificates of Acknowledgments of Deeds by Married Women under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.
Registry of Certificates of Acknowledgments of Deeds by Married Women.
Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.
In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name [*or* names] of for the period from to 18. , both inclusive, for a certificate dated the
or for certificates of acknowledgment of a deed dated the , *or* for certificates of acknowledgments of deeds relating to [*fill in the description of the property from the requisition*] and that no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid, *or* and that except the certificate [*or* certificates] described in the schedule hereto, no such certificate

has been filed in that name [*or* in any one or more of those names] during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 188 .

FORM X.

Certificate of Search by Registrar of Judgments under Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.
The Registry of Judgments.
Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.
In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, lis pendens, judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptance of office, for the period from 18 to 18 , both inclusive, and for executions for the period from 18 to 18 , both inclusive, and for annuities for the period from to 18 , both inclusive, in the name [*or* names] of and that no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or* in any one or more of those names] during the respective periods covered by the aforesaid searches, *or* and that except the mentioned in the schedule hereto, no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or* in any one or more of those names] during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

Form XI.

Requisition for Continuation of Search under the Conveyancing Act, 1882.

Supreme Court of Judicature,
Central Office.
Requisition for Continuation of Search.
To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London, W.C.
In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of , 18 , in the name [*or* names] of , from the day of to the day of , 18 , both inclusive.

Signature, address, and description of person requiring the search.

Dated

Form XII.

Certificate of result of continued Search under the Conveyancing Act, 1882, *s.* 2, *to be endorsed on Original Certificate.*

This is to certify that the search [*or* searches] mentioned in the within-written certificate has [*or* have] been diligently continued to the day of , 18 , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered, or re-registered, as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name [*or* in any one or more of the within-mentioned names].

Dated

THE SETTLED LAND ACT RULES, 1882.

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

3. The forms in the Appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

4. The persons to be served with notice of applications to the court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sects. 15 and 34, the trustees.

In the case of applications under sect. 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under sect. 44, the tenant for life or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. When a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix,

Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application, unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorized or directed by the Court under the Act, shall be carried into effect out of Court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

9. Where the Court authorizes generally the tenant for life to make from time to time leases or grants for building or mining purposes under sect. 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorizes any such lease or grant in any particular case, or where the Court authorizes a lease under sect. 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into Court. (Appendix, Forms IX., X., XI.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into Court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.

5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into Court, may contain directions for investment of the money on any securities authorized by sect. 21, sub-sect. 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises, is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested.

13. Money paid into Court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises, if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.)

14. Any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

15. In all cases not provided for by the Act or these rules, the existing practice of the Court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to Court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX

TO THE SETTLED LAND ACT RULES, 1882.

Form I.

Title of Proceedings.

In the High Court of Justice,
Chancery Division.
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]
In the matter of the estate [*or*, of the timber upon the estate], situate at , in the county of , [*or* of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the Will of dated *or, as the case may be*].
And in the matter of the Settled Land Act, 1882.

Form II.

Formal part of Summons.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of A. B., the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of A. B., the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant by X. Y., his testamentary guardian [*or*, guardian appointed by order dated the *or*, next friend].

Or, (*c.*) On the part of C. D. and E. F., the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (*d.*) On the part of G. H., the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of A. B. [*or as the case may be*].

Or, (*e.*) On the part of I. J., the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of I. J., the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned Act, of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of I. J., the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of K. L., interested under the contract hereinafter mentioned.

Dated the day of , 18 .

This summons was taken out by of , solicitor for the applicant

To

(*Add the names of the persons* (*if any*) *on whom the summons is to be served.*)

Form III.

Summons under Section 10 *for General Leasing Powers.*

Title and formal parts as in Forms I. and II. *a* or *b*.

1. That the applicant [*or in the case of an infant* that the said X. Y. during the infancy of the said A. B.] and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said A. B.], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorized from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sections 7 and 9 of the said Act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

Form IV

Summons under Sections 10 *or* 15 *for Authority to grant a particular Lease where the Tenant for Life has entered into a Contract.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said X. Y.] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the said A. B. [*or* X. Y.] may be authorized to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

FORM V.

Summons under Sections 10 *or* 15 *for Authority to grant a particular Lease when no Contract has been entered into.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the applicant [*or* the said X. Y.] may be authorised to execute the same.

2. (*Add application for costs as in Form III.* 2.)

FORM VI.

Summons under Sections 15, 35, *or* 37 *for a Sale out of Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant [*or in the case of an infant* the said X. Y.] may be authorized to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that C. D. and E. F., the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or if this Form is not applicable as in Form III.* 2.

FORM VII.

Summons under Sections 15, 35, *or* 37 *for Sale by the Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III.* 2.)

FORM VIII.

Affidavit verifying Title.

Title as in Form I.

I of make oath and say as follows :

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which A. B. is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *as the case may be*].

2. (*If it is the fact.*) The said A. B. is an infant of the age of years or thereabouts.

3. C. D., of , and E. F., of , are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned Act].

FORM IX.

Summons under Section 22 *by Purchaser for Payment into Court of Purchase-Money of Settled Land, Timber, or Chattels.*

Title as in Form I.

Formal parts as in Form II. *e.*

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement dated the and made "between [*or* will, &c.] proceeds of sale of the A. estate [*or as "the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase-money of the said A. estate (*or as the case may be*) settled by the said settlement [*or* will, &c.].

2. That such directions may be given for the investment of the said sums when paid into Court, and the accumulation or payment of the dividends of the securities representing the same, as the Court may think proper.

FORM X.

Summons under Section 22 *for Payment into Court by Lessee under a Mining Lease* (*see* Section 11).

Title as in Form I.

Formal parts as in Form II. *f.*

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement dated the and made "between [*or* the will, &c.] mineral rents under lease dated the " , and in the matter of the Settled Land Act, 1882," the sum of £ , being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the , less £ the costs of payment into Court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into Court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into Court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to A. B., the tenant for life under the above-mentioned settlement during his life or until further order.

FORM XI.

Summons under Section 22 *for Payment into Court by Mortgagee* (*see* Section 18).

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into Court to the credit of "Money advanced on mortgage of lands settled by the settle-"ment dated the , and made between [*or* the will, &c.], "and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement, less the cost of payment in.

2. (*Add directions for investment as in Form VIII.* 2.)

FORM XII.

Summons under Section 26 (1).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

FORM XIII.

Summons under Section 26, *Sub-section* (2) (ii.) *for appointment of an Engineer or Surveyor.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That M. N., of , engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XIV.

Nomination of an Engineer or Surveyor by the Trustees.

Title as in Form I.

We, C. D. of , and E. F. of , the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate , of , engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii) of the said Act.

(Signed) C. D.
E. F.

FORM XV.

Summons under Section 26, *Sub-section* (2) (iii.)

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That C. D. and E. F., the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said C. D. and E. F. under the said Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XVI.

Summons under Section 26, *Sub-section* (3).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of £ may be ordered to be raised out of the in Court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the

2. (*Add application for costs as in Form III.* 2.)

FORM XVII.

Summons under Section 31.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind, *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.

Summons under Section 34, *for application of Money paid for a Lease or Reversion.*

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.

2. (*Add application for costs as in Form III.* 2.)

FORM XIX.

Summons under Section 38 *for the Appointment of new Trustees.*

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That G. H. and I. J. may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XX.

Summons under Section 44.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).

2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

FORM XXI.

Summons under Section 56 *for Advice and Direction.*

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the judge on the following questions :—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III.* 2.)

FORM XXII.

Summons under Section 60 *for Appointment of Persons to exercise Powers on behalf of Infant.*

Title as in Form I.

Formal parts as in Form II. *b*.

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.

2. (*Add application for costs as in Form III.* 2.)

FORM XXIII.

Summons for Directions as to Service of a Petition.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of 18 .

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

GENERAL RULES.

By virtue and in pursuance of the Land Charges Registration and Searches Act, 1888, I, Hardinge Stanley, Baron Halsbury, Lord High Chancellor of Great Britain, do make the following General Rules for the purpose of carrying the said Act into effect :—

Rule 1.—The several registers established by the Act shall contain the following particulars respectively, or such other particulars as the registrar shall from time to time determine :—

(1.) The register of writs and orders shall contain :—

(*a.*) The name, address, and description of the person whose land is affected.

(*b.*) The date and nature of the writ or order, and the Court, and the action or matter, by and in which the writ or order was issued or made.

(*c.*) The date of registration, and of any renewal of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

(2.) The register of deeds of arrangement shall contain :—

(*a.*) The name, address, and description of the person whose land is affected.

(*b.*) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three.

(*c.*) The date of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

(3.) The register of land charges shall contain :—

(*a.*) The name, address, and description, and capacity (that is to say, whether (i.) beneficially entitled to the first estate of freehold ; (ii.) tenant on the court rolls ; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made.

(*b.*) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated.

(*c.*) The date of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a

solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the registers themselves, all entries in such registers being made alphabetically in the manner now used in the Register of Judgments in the Central Office of the High Court of Justice, or in such other manner as the registrar shall from time to time determine.

Rule 4.—Applications for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the schedule hereto, or in such other forms as the registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the Office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the register, such evidence in respect thereof as the registrar shall from time to time think necessary shall be required.

Rule 8.—These Rules may be cited as the Land Charges Rules, 1889.

HALSBURY, C.

January 1, 1889.

THE SCHEDULE.

FORMS.

FORM 1.

Application to Register a Writ or Order.

REGISTER OF WRITS AND ORDERS.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Filed for Registration the day of , 18 . By of (*Signed*) Applicant [*or* Solicitor].	A of the Division of the High Court. Dated the day of , 18 . *Title of the Action or Matter* Plaintiff. Defendant.

Name of the Person whose Estate is affected.

Surname.	Christian Name or Names.	Address.	Title, Trade, or Profession.

FORM 2.

Application to Register a Deed of Arrangement.

REGISTER OF DEEDS OF ARRANGEMENT.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Filed for Registration the day of , 18 . By of (*Signed*) Applicant [*or* Solicitor].	Date of the deed . *Parties to the Deed.**

* Names only ; and, where the creditors are numerous, enter the names of the first three, adding "and others."

Name of the Person whose Estate is affected.

Surname.	Christian Name or Names.	Address.	Title, Trade, or Profession.

FORM 3.

Application to Register a Land Charge.

REGISTER OF LAND CHARGES.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Filed for Registration the day of , 18 . By _____ of _____ (*Signed*)_____ Applicant [*or* Solicitor].	A charge upon lands in the Parish(es) of . Dated the day of , 18 . By virtue of the statute .

The Person in whose Name the Registration is to be made.

Surname.	Christian Name.	Address.	Title, Trade, or Profession.	Capacity.*

* Here state whether beneficially entitled to the first estate of freehold, or to a lease for lives or life, or for a term of years, or whether tenant on the court rolls of the manor.

FORM 4.

Declaration in support of an Application to Register.

I, , of , solemnly and sincerely declare that the writ [order, deed, charge], whereof the particulars are set forth in the application for registration thereof, marked "A," and now produced and shown to me, was actually issued [made, executed] at the time and in the manner in the said application mentioned, and that the particulars set forth therein are to the best of my knowledge, information, and belief, true.

And I make, &c.

FORM 5.

Application for an Official Search.

APPLICATION FOR OFFICIAL SEARCH.

N.B.—This Form may be filled in for a future day not less than three days subsequent to its arrival in the office.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Please search the Register of Writs and Orders for the period of five years ending the of , 18 , inclusive. [Deeds of Arrangement from the of , 18 , to the of , 18 , inclusive. Land Charges from the of , 18 , to the of , 18 , inclusive.]

Surname or Names.	Christian Name or Names.	Address or Addresses.*	Titles, Trades, or Professions.*

* If the person against whom the search is to be made has more than one address, title, trade, or profession, this may be filled up accordingly.

I declare that the above search(es) is (are) required for the purposes of a sale [mortgage, lease *or*, (*as the case may be*)] from to .

N.B.—State here whether certificate to be sent by post or to be kept till called for.

Signature, Address, and Description of the Applicant or Solicitor. } ———

Dated this of , 18 .

———

FORM 6.

Declaration by separate Instrument as to purposes of Search.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

I declare that the search(es) in the name(s) of required by the application of dated the of , 18 , is (are) required for the purposes of a sale [mortgage, lease *or*, (*as the case may be*)] from to .

Signature and address of applicant or solicitor:

——— of ———.

Dated this of , 18 .

———

FORM 7.

Certificate of Official Search.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

This is to certify that there are no entries in the Registry of Writs and Orders for the period of five years ending inclusive, [Deeds of Arrangement from to inclusive, Land Charges from to inclusive], in the names of except the following :—

Dated this of 18 .

(*Land Registry Search Department.*)

FORM 8.

Requisition for Continuation of Official Search.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Please continue the search(es) in the Register(s) of made pursuant to the requisition dated the of 18 in the name(s) of down to the of 18 inclusive.

Signature and address of applicant or solicitor: ———

Dated this of 18 .

N.B.—The certificate of the original search must be forwarded with this application.

FORM 9.

Certificate of Continuation of Official Search (to be endorsed on the original Certificate).

This is to certify that there are no further entries in the Register of against the within name(s) down to the of 18 inclusive, except the following, namely,

In the Register of .

Dated this of 18 .

(*Land Registry Search Department.*)

SUPREME COURT OF JUDICATURE, ENGLAND.

The Judicial Trustee Rules, 1897, Dated August 31, 1897.

Arrangement of Rules.

Rules.
1. Short title.

Appointment of Judicial Trustee.

2. Mode of making application.
3. Service of summons.
4. Statement to be supplied on application.
5. Removal of restriction as to appointment of certain persons to be trustees.
6. Vesting orders.

Appointment of Official of Court to be Judicial Trustee.

7. Official judicial trustee.

Administration of the Trust.

8. Statement of trust property.
9. Security.
10. Trust account at bank and custody of documents.
11. Judicial trustee not to keep money in his hands.
12. Directions to judicial trustees.
13. Power to dispense with formal evidence.

Accounts and Audit.

14. Accounts and audit.
15. Filing and inspection of accounts.
16. Deductions allowed.

Remuneration and Allowances.

17. Remuneration of judicial trustee.
18. Application of remuneration of official of the Court.
19. Forfeiture of remuneration.

Removal and Suspension of Judicial Trustee.

20. Suspension of judicial trustee.
21. Removal of judicial trustee.
22. Inquiry into conduct of judicial trustee.

Resignation and Discontinuance of Judicial Trustee.

23. Resignation of judicial trustee.
24. Discontinuance of judicial trustee.

Special Trusts.

25. Executors and administrators.
26. Special trusts.

Exercise of the Powers of the Court.

27. Exercise of powers of Court.
28. Communication between judicial trustee and Court.

District Registries.

29. District registries.

Palatine Courts.

30. Palatine Courts.

County Courts.

31. County court jurisdiction.

Fees.

32. Fees.

Officer of the Court.

33. Meaning of "officer of Court."

Supplemental.

34. Rules to be construed as part of the general rules of Court.
35. Application of Interpretation Act.

SCHEDULE.

JUDICIAL TRUSTEE RULES.

RULES UNDER THE JUDICIAL TRUSTEES ACT, 1896.

1. The following Rules may be cited as the Judicial Trustee Rules, 1897, and shall apply as far as practicable to all matters and proceedings under the Judicial Trustees Act, 1896 (in these Rules called the Act). Short title. 59 & 60 Vict. c. 35.

Appointment of Judicial Trustee.

2. An application to the Court to appoint a judicial trustee shall be in the Chancery Division, and Mode of making application.

(*a*) if not made in a pending cause or matter, shall be made by originating summons; and

(*b*) if made in a pending cause or matter, shall be made as part of the relief claimed, or by summons in the cause or matter.

3.—(1.) The summons shall be served,— Service of summons.

(*a*) where the application is made by or on behalf of a trustee, on the other trustee (if any); and

(*b*) where the application is made by or on behalf of a beneficiary, on the trustees (if any),

and in either case on such (if any) of the beneficiaries as the Court directs.

(2.) Where the application is made by or on behalf of a person creating or intending to create a trust, the summons, subject to any direction of the Court, need not be served on any person.

(3.) The Court may give any directions it thinks fit, either dispensing with the service of the summons on any person on whom it is required to be served under this Rule, or requiring

the service of the summons on any person on whom it is not required to be served under this Rule.

Statement to be supplied on application.

4.—(1.) Where an application is made for the appointment of a judicial trustee by originating summons, the applicant must, when he takes out the summons, supply for the use of the Court a written statement signed by him containing the following particulars so far as he can gain information with regard to them:—

(*a*) A short description of the trust and instrument by which it is, or is to be, created, and of the relation which the applicant bears to the trust;

(*b*) If a person is nominated as judicial trustee, the name and address of the person nominated, and short particulars of the reasons which led to his nomination;

(*c*) If a person is nominated as judicial trustee, a statement whether it is proposed that the person nominated should be remunerated or not;

(*d*) Short particulars of the trust property, with an approximate estimate of its income, and capital value;

(*e*) Short particulars of the incumbrances (if any) affecting the trust property;

(*f*) A statement whether it is proposed that the judicial trustee should be a sole trustee or should act jointly with other trustees;

(*g*) Particulars as to the persons who are in possession of the documents relating to the trust;

(*h*) The names and addresses of the beneficiaries and short particulars of their respective interests;

(*i*) Any exceptional circumstances specially affecting the administration of the trust.

(2.) An affidavit by the applicant verifying the statement shall be sufficient primâ facie evidence of the particulars contained in the statement.

(3.) Where the applicant cannot gain the information necessary for making the required statement on any point, he must mention the fact in his statement.

Removal of restriction as to appointment of certain persons to be trustees.

5.—(1.) The Court shall not be precluded by any existing practice as to the appointment of trustees from appointing any person to be a judicial trustee by reason of that person being a beneficiary, or a relation or husband or wife of a beneficiary, or a solicitor to the trust or to the trustee, or to any beneficiary, or a married woman, or standing in any special position with regard to the trust.

(2.) A person may be appointed to be a judicial trustee of a trust although he is already a trustee of the trust.

Vesting orders.

6.—On the appointment of any person to be judicial trustee the Court shall make such vesting or other orders and exercise such other powers as may be necessary for vesting the trust property in the judicial trustee either as sole trustee or jointly with other trustees as the case requires.

Appointment of Official of Court to be Judicial Trustee.

Official judicial trustee.

7.—(1.) Where an official of the Court is appointed judicial trustee, the official solicitor of the Court shall (subject to the provisions herein-after contained in rules twenty-nine, thirty, and thirty-one) be so appointed, unless, for special reasons, the Court directs that some other official of the Court should be so appointed.

(2.) Any official of the Court appointed to be a judicial trustee shall, on his ceasing to hold office, cease to be such a trustee without any formal resignation.

(3.) Where an official of the Court is judicial trustee, any trust property vested in or held by him, shall be vested in and held by him under his official title and not in his own name.

(4.) Where an official of the Court appointed to be a judicial trustee of a trust dies, or ceases to hold office, his successor in office shall, unless the Court otherwise directs, become judicial trustee of the trust without any order of the Court or formal appointment, and the trust property shall, without any conveyance, assignment, or transfer, in such a case become vested in the successor as it was vested in his predecessor in office.

(5.) For the purpose of the definition of "official of the Court," in section five of the Act, any paid office in or connected with the Court shall be a prescribed office.

Administration of the Trust.

Statement of trust property.

8.—(1.) A judicial trustee must, unless in any case the Court considers that it is unnecessary, as soon as may be after his appointment, furnish the Court with a complete statement of the trust property, accompanied with an approximate estimate of the income and capital value of each item.

(2.) It shall be the duty of the judicial trustee to give such information to the Court as may be necessary for the purpose of keeping the statement of the trust property correct for the time being.

Security.

9.—(1.) A judicial trustee, if not an official of the Court, must give security to the Court for the due application of the trust property, unless the Court dispenses with security under this rule.

(2.) The Court may, on the appointment of a judicial trustee, or at any time during his continuance in office as judicial trustee, dispense with security on the application either of the person who is to be appointed or is judicial trustee, or of any person appearing to the Court to be interested in the trust, and shall do so where a judicial trustee is appointed on the application of a person creating or intending to create a trust, and that person desires that security should be dispensed with, unless for special reasons the Court consider that security is in such a case necessary or desirable.

(3.) The security must be given, either by recognizance, bond, or otherwise, as the Court directs, and with such sureties as the Court approves.

(4.) If the Court is satisfied that sufficient provision is made for the safety of the capital of the trust property, the amount of the security shall, in ordinary cases, be an amount exceeding by twenty per centum the income of the trust property as estimated by the Court.

(5.) The Court may at any time require that the amount or nature of the security given by a judicial trustee under this Rule be varied, or that security be given where it has previously been dispensed with, and a judicial trustee shall comply with any such requirement.

(6.) It shall be a condition of every recognizance, bond, or other form of security given under this Rule that the judicial trustee shall give immediate notice to the Court of the death or insolvency of any of his sureties.

(7.) Any recognizance, bond, or other form of security given for the purpose of this Rule may be vacated in such manner and subject to such conditions as the Court may direct.

(8.) Where security is not dispensed with, the appointment of a person to be judicial trustee shall not take effect until he has given the security required by the Court under this Rule.

(9.) Any premium payable by a judicial trustee to any guarantee company on account of his security may, if the Court so directs, be paid out of the trust property.

Trust account at bank and custody of documents.

10.—(1.) When a judicial trustee is appointed, a separate account for receipts and payments on behalf of the trust must be kept in the name of the trustees at some bank approved by the Court.

(2.) All title deeds and all certificates and other documents which are evidence of the title of the trustee to any of the trust property shall be deposited either with that bank or in such other custody as the Court directs.

(3.) The deeds or documents must be deposited in the names of the trustees, and the judicial trustee must give notice to the body or person with whom the deeds or documents are so deposited not to deliver any of them over to any person except on a request signed by the judicial trustee and countersigned by the officer of the Court, and also to allow any person authorized by the officer of the Court in writing to inspect them during business hours.

(4.) The judicial trustee must deposit with the Court a list of all deeds or documents deposited in any custody in pursuance of this Rule, and must give information to the Court from time to time of any variation to be made in the list.

(5.) The judicial trustee must, if at any time directed by the Court, give an order to the bank at which the trust account is kept, not to pay at any one time any sum over a specified amount out of the trust account except on an order countersigned by the officer of the Court.

(6.) Any payments on account of the income of the trust property may be provided for by means of a standing order to the bank at which the trust account is kept.

(7.) The Court may give such directions to the judicial trustee as may, in the opinion of the Court, be necessary or expedient for carrying this Rule into effect, and for securing the safety of the trust property.

(8.) Where an official of the Court is judicial trustee, the Court may direct that, instead of a separate account of the receipts and payments on behalf of the trust being kept at some bank approved by the Court, all receipts on behalf of the trust may be dealt with, and all payments on behalf of the trust may be made, in such manner, and subject to such regulations as to the accounts to be kept of the receipts and payments and the procedure to be followed in dealing therewith, as the Treasury direct.

Judicial trustee not to keep money in his hands.

11. A judicial trustee must pay all money coming into his hands on account of his trust without delay to the trust account at the bank, and if he keeps any such money in his hands for a longer time than the Court considers necessary, shall be liable to pay interest upon it at such rate not exceeding five per centum as the Court may fix for the time during which the money remains in his hands.

Directions to judicial trustees.

12.—(1.) A judicial trustee may at any time request the Court to give him directions as to the trust or its administration.

(2.) The request must be accompanied by a statement of the facts with regard to which directions are required, and by the fee required under these Rules in respect of a communication from the Court with regard to the administration of the trust.

(3.) The Court may require the trustee or any other person to attend at chambers if it appears that such an attendance is necessary or convenient for the purpose of obtaining any information or explanation required for properly giving directions, or for the purpose of explaining the nature of the directions.

Power to dispense with formal evidence.

13. The Court, if satisfied that there is no reasonable doubt of any fact which affects the administration of a trust by a judicial trustee, may give directions to the judicial trustee to act without formal proof of the fact.

Accounts and Audit.

Accounts and audit.

14.—(1.) The Court shall give directions to a judicial trustee as to the date to which the accounts of the trust are to be made up in each year, and shall fix in each year the time after that date within which the accounts are to be delivered to it for audit.

(2.) The accounts shall in ordinary cases be audited by the officer of the Court, but the Court, if it considers that the accounts are likely to involve questions of difficulty, may refer them to a professional accountant for report, and order the payment to him of such amount in respect of his report as the Court may fix.

Filing and inspection of accounts.

15.—(1.) The accounts of any trust of which there is a judicial trustee, with a note of any corrections made upon the audit, shall be filed as the Court directs.

(2.) The judicial trustee shall send a copy of the accounts, or, if the Court thinks fit, of a summary of the accounts, of the trust to such beneficiaries or other persons as the Court thinks proper.

(3.) The Court may, if it thinks fit, having regard to the nature of the relation of the applicant to the trust, allow any person applying to inspect the filed accounts so to inspect them on giving reasonable notice to the officer of the Court.

Deductions allowed.

16. A judicial trustee shall, unless the Court otherwise directs, be allowed on the audit of his accounts deductions made on account of his remuneration and allowances under these Rules and also on account of the fees paid by him under these Rules, but shall not be allowed any deduction on account of the expenses of professional assistance, or his own work, or personal outlay, unless the deduction has been authorized by the Court in pursuance of the Act, or the Court is satisfied that the deduction is justified by the strict necessity of the case.

Remuneration and Allowances.

Remuneration of judicial trustee.

17.—(1.) Where a judicial trustee is to be remunerated, the remuneration to be paid to him shall be fixed by the Court, and may be altered by the Court from time to time.

(2.) In fixing the remuneration, regard shall be had to the duties entailed upon the judicial trustee by the trust.

(3.) The Court may make, if it thinks fit, special allowances to judicial trustees for the following matters, to be paid out of the trust property—

(*a*) for the statement of trust property prepared by a judicial trustee on his appointment, an allowance not exceeding ten guineas;

(*b*) for realizing and re-investing trust property, where the property is realized for the purpose of re-investment, an allowance not exceeding one and a half per centum on the amount realized and re-invested;

(*c*) for realizing or investing trust property in any other case, an allowance not exceeding one per centum on the amount realized or invested.

(4.) The Court may also in any year make a special allowance to a judicial trustee, if satisfied that in that year more trouble has been thrown upon the trustee by reason of exceptional circumstances than would ordinarily be involved in the administration of the trust.

(5.) Where a trustee is remunerated, any allowance under this rule may be paid in addition to his remuneration.

(6.) Any remuneration or allowance payable to a judicial trustee shall be paid or allowed to him at such times and in such manner as the Court directs.

18. Where an official of the Court is appointed to be a judicial trustee, any remuneration, allowances, or other payments payable to him on account of his services as trustee shall be paid, accounted for, and applied in such manner as the Treasury direct. Application of remuneration of official of the Court.

19.—(1.) If the Court is satisfied that a judicial trustee has failed to comply with the Act, or with these Rules, or with any direction of the Court or officer of the Court made in accordance with the Act or these Rules, or has otherwise misconducted himself in relation to the trust, the Court may order that the whole or any part of the remuneration of the trustee be forfeited. Forfeiture of remuneration.

(2.) This Rule shall not affect any liability of the judicial trustee for breach of trust or to be removed or suspended.

(3.) A judicial trustee shall have an opportunity of being heard by the Court, before any order is made for the forfeiture of his remuneration or any part of it.

Removal and Suspension of Judicial Trustee.

20.—(1.) The Court may at any time, either without any application or on the application of any person appearing to the Court to be interested in the trust, suspend a judicial trustee, if the Court considers that it is expedient to do so in the interests of the trust, and a judicial trustee while suspended shall not have power to act as trustee. Suspension of judicial trustee.

(2.) When a judicial trustee is suspended, the Court shall cause notice to be given to such of the persons appearing to the Court to be interested in the trust as the Court directs, and also to the persons having the custody of the trust property, and shall give any other directions which appear necessary for securing the safety of the trust property.

21.—(1.) The Court may, either without any application or on the application of any person appearing to the Court to be interested in the trust, remove a judicial trustee if the Court considers that it is expedient to do so in the interests of the trust. Removal of judicial trustee.

(2.) Any application to remove a judicial trustee must be made by summons.

(3.) A judicial trustee shall not be removed by the Court without an application for the purpose, except after notice has been given to him by the Court of the grounds on which it is proposed to remove him, and of the time and place at which the matter will be heard.

(4.) The Court shall cause a copy of the notice to the trustee to be sent to such of the persons appearing to the Court to be interested in the trust as the Court directs, and the same procedure shall be followed in the matter so far as possible as on a summons to remove a judicial trustee.

Inquiry into conduct of judicial trustee.

22. Where an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee is ordered, the inquiry shall, unless the Court otherwise directs, be conducted by the officer of the Court, and he shall have the same powers in relation thereto as he has in relation to any other inquiry directed by the Court.

Resignation and Discontinuance of Judicial Trustee.

Resignation of judicial trustee.

23.—(1.) If a judicial trustee desires to be discharged from his trust he must give notice to the Court, stating at the same time what arrangements it is proposed to make with regard to the appointment of a successor.

(2.) The Court shall give facilities for the appointment on a proper application of an official of the Court to be judicial trustee in place of a judicial trustee who desires to be discharged, in cases where no fit and proper person appears available for the office, or where the Court considers that such an appointment is convenient or expedient in the interests of the trust.

Discontinuance of judicial trustee.

24.—(1.) Where there is a judicial trustee of a trust, the Court may at any time, on the application made by summons of any person appearing to the Court to be interested in the trust, order that there shall cease to be a judicial trustee of the trust, whether the person who is judicial trustee continues as trustee or not.

(2.) If the Court is satisfied that all the persons appearing to the Court to be interested in the trust concur in an application under this Rule, the Court shall accede to the application, and in any case shall ascertain as far as may be the wishes of those appearing to the Court to be interested in the trust with regard to the application.

(3.) Where an order is made under this Rule, the Court shall make all such orders as may be necessary for carrying it into effect, and where in pursuance of any such order a new trustee is appointed in the place of an official of the Court, shall make all such vesting or other orders and exercise all such other powers as may be necessary for vesting the trust property in the new trustee either as sole trustee or jointly with other trustees as the case requires.

Special Trusts.

Executors and administrators.

25.—(1.) Any person who is an executor or administrator may be appointed a judicial trustee for the purpose of the collection and distribution of the estate of a deceased person in the same manner and subject to the same provisions as in the case of an ordinary trust.

(2.) Where an administrator has given an administration bond, he need not give security as a judicial trustee under these Rules unless the Court directs that he is to do so.

26.—(1.) An official of the Court shall not be appointed or act as judicial trustee for any persons in their capacity as members or debenture holders of, or being in any other relation to, any incorporated or unincorporated company, or any club. Special trusts.

(2.) Where the circumstances of any trust of which an official of the Court is a judicial trustee, or of which it is proposed to appoint an official of the Court to be a judicial trustee, involve the carrying on of any trade or business, special intimation of the fact shall be given to the Court either by the judicial trustee or by the person making the application for the appointment of the judicial trustee, as the case may be, and the Court shall specially consider the facts of the case with a view to determining whether the official of the Court should continue or be appointed as judicial trustee, and whether any special condition should be made or directions given with a view to ensuring the proper supervision of the trade or business.

Exercise of the Powers of the Court.

27. For the purpose of the Act or these Rules the officer of the Court may exercise any power which may be exercised by the Court (including the power of making an order for the appointment of a judicial trustee or making any vesting order), and may perform any duty to be performed by the Court, and may hear and investigate any matter which may be heard or investigated by the Court, subject in any case to the right of any party to bring any particular point before the Judge. Exercise of powers of Court.

28.—(1.) It shall not be necessary to take out a summons for any purpose under the Act or these Rules, except in cases where a summons is required by these Rules, or where the Court directs a summons to be taken out. Communication between judicial trustee and Court.

(2.) Where a judicial trustee desires to make any application or request to the Court, or to communicate with the Court as to the administration of his trust, he may do so by letter addressed to the officer of the Court without any further formality.

(3.) The Court may give any direction to a judicial trustee with regard to the administration of his trust by letter signed by the officer of the Court, and addressed to the trustee without drawing up any order or formal document.

(4.) For the purpose of the attendance at chambers of the judicial trustee or any other person connected with the trust for purposes relating to the administration of the trust, the officer of the Court may make such appointments as he thinks fit by letter without the service of formal notices.

(5.) Any document may be supplied for the use of the Court by leaving it with, or sending it by post to, the officer of the Court.

District Registries.

29.—(1.) An originating summons under these Rules, for the purpose of an application to appoint a judicial trustee, may District registries.

be sealed and issued in a district registry, and appearances thereon shall be entered in that registry.

(2.) Where a judicial trustee of a trust is appointed on an originating summons taken out in a district registry, or an application in any cause or matter pending in a district registry, all proceedings with respect to the trust and the administration thereof under the Act or these Rules shall, unless the Court otherwise directs, be taken in the district registry.

(3.) Where proceedings under the Act or these Rules are taken in the district registry, the official of the Court to be appointed judicial trustee where an official of the Court is to be so appointed, shall not be the official solicitor, unless the Court for special reasons otherwise directs.

(4.) For the purpose of the Act and these Rules the Court may transfer any trust of which there is a judicial trustee from a district registry to London, or from London to a district registry, or from one district registry to another district registry, according as it appears convenient for the administration of the trust.

Palatine Courts.

Palatine Courts.

30.—(1.) These Rules shall apply to a Palatine Court as respects trusts within the jurisdiction of such Court, subject to such modifications (if any) as may be made by rules of that Court for the purpose of making these Rules properly applicable having regard to any special practice of the Court, or the duties of the officers attached to the Court.

(2.) Where proceedings under the Act or these Rules are taken in the Palatine Court, the official of the Court to be appointed judicial trustee where an official of the Court is to be so appointed, shall not be the official solicitor, unless the Palatine Court for special reasons otherwise directs.

County Courts.

County court jurisdiction. 51 & 52 Vict. c. 43.

31.—(1.) For the purpose of the Act and these Rules the jurisdiction of the county court judge shall extend to any trust in which the trust property does not exceed in value five hundred pounds, as if that jurisdiction had been given under section sixty-seven of the County Courts Act, 1888, but that jurisdiction shall be exercised only in a metropolitan county court, or in a county court for the time being having bankruptcy jurisdiction.

(2.) Where the district of any county court (other than a metropolitan county court) or any part of such a district is attached for the purpose of bankruptcy jurisdiction to some court other than the county court of the district, that district or part shall be attached to the same court for the purpose of jurisdiction under the Act and these Rules.

(3.) Where proceedings under the Act or these Rules are taken in the county court, the official of the Court to be appointed judicial trustee, where an official of the Court is to

be so appointed, shall not be the official solicitor, unless the Court for special reasons otherwise directs.

(4.) In the application of these rules to the county court a petition shall be substituted for a summons, whether an ordinary or an originating summons.

(5.) For the purposes of this Rule the expression "Metropolitan County Court" means any of the county courts mentioned in the third schedule of the Bankruptcy Act, 1883. 46 & 47 Vict. c. 52.

Fees.

32.—(1.) The fees mentioned in the schedule to these Rules shall be paid in respect of the matters therein mentioned. Fees.

(2.) The fees paid by a judicial trustee may be deducted out of the income of the trust property unless the Court otherwise directs.

(3.) Any fees payable under these Rules may be remitted by post, and may be so remitted in any manner except by means of postage stamps or coin.

(4.) All fees payable under these Rules in the High Court, Palatine Court, or county court shall, except as provided by these Rules, be subject to similar provisions as to payment, account, and application as other fees payable in those Courts respectively.

Officer of the Court.

33. In these Rules the expression "officer of the Court" means— Meaning of "officer of Court."

(*a*) as regards proceedings in the High Court other than proceedings in a district registry the Chancery Master, that is to say, the Master attached to the chambers of the Judge of the Chancery Division to whom the matter is assigned; and

(*b*) as regards proceedings in a district registry, any registrar of that registry; and

(*c*) as regards proceedings in a Palatine Court, any registrar of that Court;

(*d*) as regards proceedings in the county court, the registrar of the county court.

Supplemental.

34. These Rules shall be construed, so far as they relate to the High Court, as one with the Rules of the Supreme Court, 1883, and any Rules amending those Rules, so far as they relate to a Palatine Court, as one with the Rules of that Court, and so far as they relate to the county court, as one with the County Court Rules, 1889, and any Rules amending those Rules. Rules to be construed as part of the general rules of Court.

35. The Interpretation Act, 1889, shall apply for the purpose Application of Interpre-

tation Act, 52 & 53 Vict. c. 63.

of the interpretation of these Rules as it applies for the purpose of the interpretation of an Act of Parliament.

August 31, 1897.

Halsbury, C.

Schedule.

Fees.

	£	*s.*	*d.*
The following fees shall be payable under these Rules—			
1. In respect of any thing or matter for which a fee is provided under the Orders in force for the time being with regard to Supreme Court, Palatine Court, or County Court, fees, as the case may be.	The fee so provided.		
In respect of any communication from the Court with regard to the administration of the trust ...	0	2	6
For filing the statement of the trust property ...	0	10	0
For filing any alteration in the statement ...	0	5	0
For filing the accounts of the trust	0	5	0
For filing any other document relating to the trust	0	2	6
For auditing the accounts of the trust when audited by the officer of the Court, for every 100*l.* or fraction of 100*l.* of the gross amount received as income of the trust without deducting any payments	0	2	6
On the audit of the accounts of the trust where they are referred to a professional accountant for report	A fee equal to the amount paid to the accountant.		
On the inspection of filed accounts for each hour or part of an hour occupied	0	2	6
not exceeding on one day	0	10	0

TRUSTEE.

JUDICIAL TRUSTEES.

The Judicial Trustee Rule (April), 1900. Dated May 21, 1900.

Notwithstanding anything in these Rules contained, where an official of the Court is sole judicial trustee the trust funds and the title deeds, certificates, and other documents which are evidence of the title of the trustee to any of the trust property, and all receipts on behalf of the trust, shall be dealt with, and all payments on behalf of the trust shall be made, and accounts shall be kept, in such manner and subject to such regulations as the Treasury may direct.

This Rule shall be construed as one with the Judicial Trustee Rules, 1897.

Halsbury, C.

Dated the 21st of May, 1900.

Note.—This Rule is signed in confirmation of the Rule signed and declared urgent on the 9th of April.

APPENDIX II.

Land Drainage Act, 1861, Sects. 34, 35, and 36 . . 575

Agricultural Holdings Act, 1908, Sects. 15—20 . . 576

Glebe Lands Act, 1888, Sect. 8, Sub-Sect. (4) . . . 579

Housing of the Working Classes Act, 1890, Sect. 74 . 580

Small Holdings and Allotments Act, 1908, Sects. 4 and 5 581

"The Times" Report of *Marquis Camden* v. *Murray*. . 582

THE LAND DRAINAGE ACT, 1861.

(24 & 25 Vict. c. 133.)

Sections 34, 35, and 36.

"Liabilities by reason of Tenure.

Sect. 34. Power to commute liabilities to repair by reason of tenure.

"**34.** The commissioners may, with the consent of the Inclosure Commissioners, testified in writing under their common seal, commute, for such sums of money as they think expedient, the obligation imposed on any person, by reason of tenure, custom, prescription, or otherwise, to repair any walls, maintain any sewer, or do any other work within their jurisdiction.

Sect. 35. Nature of commutation.

"**35.** Any commutation so made may be by way of gross or annual charge on the lands of the person in respect of which the original obligation arose; and any charge so created shall be recoverable by the commissioners in the same manner in which tithe rentcharge is recoverable, and shall have priority over all incumbrances created or to be created by any proprietor of the lands on which the same is charged.

Sect. 36. Deposit of record of commutation.

"**36.** The record of any such charge as aforesaid shall be deposited in the office of the clerk of the peace of the county in which the district or the greater part of the district within the jurisdiction of the commissioners is situate; and such record, or any certified copy thereof, shall be receivable in evidence in all legal proceedings."

THE AGRICULTURAL HOLDINGS ACT, 1908.

(8 Edw. 7, c. 28.)

Charge on Holding for Compensation.

Power for landlord on paying compensation to obtain charge.

15.—(1.) A landlord, on paying to the tenant the amount due to him under this Act, or under custom or agreement, or otherwise in respect of compensation for an improvement comprised in the First Schedule hereto, or on expending after notice given in accordance with this Act such amount as may be necessary to execute an improvement comprised in Part II. of the First Schedule hereto, shall be entitled to obtain from the Board an order in favour of himself, his executors, administrators, and assigns, charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the Board think fit.

(2.) Where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, in the opinion of the Board, have become exhausted.

(3.) Where the estate or interest of a landlord is determinable or liable to forfeiture by reason of his creating or suffering any charge thereon, that estate or interest shall not be determined or forfeited by reason of his obtaining a charge under this Act, anything in any deed, will, or other instrument to the contrary thereof notwithstanding.

Incidence of charge.

16. The sum charged by the order of the Board under this Act shall be a charge on the holding, or the part thereof charged, for the landlord's interest therein and for all interests therein subsequent to that of the landlord; but so that, in any case where the landlord's interest is an interest in a leasehold, the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assigns.

Advance made by a company.

17. Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by the Board under this Act, or made under any enactment hereby repealed, upon such terms and conditions as may be agreed upon between the company and the person entitled to the charge, and may assign any charge so acquired by them.

18. Where a charge may be made under this Act for compensation due under an award, the person making the award shall, at the request and cost of the person entitled to obtain the charge, certify the amount to be charged and the term for which the charge may properly be made, having regard to the time at which each improvement in respect of which compensation is awarded is to be deemed to be exhausted. Certificate as to charges.

19. A charge made by the Board under this Act shall be a land charge within the meaning of the Land Charges Registration and Searches Act, 1888, as amended by any subsequent enactment, and may be registered accordingly. Registration of charges. 51 & 52 Vict. c. 51.

Capital Money applicable for Compensation.

20. Capital money arising under the Settled Land Acts, 1882 to 1890, may be applied— Capital money applicable for compensation.

(1.) In payment as for an improvement authorised by those Acts of any money expended and costs incurred by a landlord under or in pursuance of this Act or any enactment hereby repealed, or under custom or agreement or otherwise, in or about the execution of any improvement comprised in Part I. or Part II. of the First Schedule hereto; and

(2.) In discharge of any charge in respect of any such improvement created on a holding under this Act or any enactment hereby repealed, as if the charge were an incumbrance authorised by those Acts to be discharged out of that capital money.

FIRST SCHEDULE.

PART I.

IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS REQUIRED.

(1.) Erection, alteration, or enlargement of buildings.
(2.) Formation of silos.
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.
(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improving of roads or bridges.
(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9.) Making or removal of permanent fences.
(10.) Planting of hops.
(11.) Planting of orchards or fruit bushes.
(12.) Protecting young fruit trees.
(13.) Re-claiming of waste land.

(14.) Warping or weiring of land.
(15.) Embankments and sluices against floods.
(16.) Erection of wirework in hop gardens.

[N.B.—*This part is subject as to market gardens to the provisions of Part III.*]

PART II.

IMPROVEMENTS IN RESPECT OF WHICH NOTICE TO LANDLORD IS REQUIRED.

(17.) Drainage.

PART III.

IMPROVEMENTS IN RESPECT OF WHICH CONSENT OF OR NOTICE TO LANDLORD IS NOT REQUIRED.

(18.) Chalking of land.
(19.) Clay-burning.
(20.) Claying of land or spreading blaes upon land.
(21.) Liming of land.
(22.) Marling of land.
(23.) Application to land of purchased artificial or other purchased manure.
(24.) Consumption on the holding by cattle, sheep, pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding stuff not produced on the holding.
(25.) Consumption on the holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn proved by satisfactory evidence to have been produced and consumed on the holding.
(26.) Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy.
(27.) Repairs to buildings being buildings necessary for the proper cultivation or working of the holding other than repairs which the tenant is himself under an obligation to execute, provided that the tenant, before beginning to execute any such repairs, shall give to the landlord notice in writing of his intention, together with particulars of such repairs, and shall not execute the repairs unless the landlord fails to execute them within a reasonable time after receiving such notice.

THE GLEBE LANDS ACT, 1888.

(51 & 52 Vict. c. 20, s. 8, sub-sect. (4).)

(4.) Subject to the provisions of this Act, the provisions of the Settled Land Act, 1882, with respect to the sale of land by a tenant for life shall, so far as circumstances admit, apply to a sale under this Act by an incumbent in like manner as if he were the tenant for life of the land, and accordingly he shall have the like power with respect to contracts as a tenant for life under that Act, and may do all things necessary and proper for carrying into effect a sale under this Act. 45 & 46 Vict. c. 38.

THE HOUSING OF THE WORKING CLASSES ACT, 1890.

(53 & 54 Vict. c. 70, s. 74.)

Amendment of 45 & 46 Vict. c. 38 as regards erection of buildings for working classes.

74.—(1.) The Settled Land Act, 1882, shall be amended as follows :—

(a) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working classes, may be made at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

(b) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the court is not injurious to the estate.

(2.) Any body corporate holding land may sell, exchange, or lease the land for the purpose of the erection of dwellings for the working classes at such price, or for such consideration, or for such rent as having regard to the said purpose, and to all the circumstances of the case, is the best that can reasonably be obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

THE SMALL HOLDINGS AND ALLOTMENTS ACT, 1908.

(8 Edw. 7, c. 36, s. 40 (4), (5).)

(4.) Where a person having the powers of a tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, sells, exchanges, or leases, any settled land to a county council for the purposes of small holdings, the sale, exchange, or lease may be made at such a price, or for such consideration, or at such rent as, having regard to the said purposes, and to all the circumstances of the case, is the best that can be reasonably obtained.

(5.) A person having the powers of a tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, may grant the settled land, or a part thereof, to a county council for the purposes of small holdings in perpetuity, at a fee farm or other rent secured by condition of re-entry, or otherwise, as may be agreed upon.

REPORT

Of the Case of Marquis Camden *v.* Murray (*c*).

[*Reprinted, by permission, from* "*The Times*," 19*th July*, 1883.]

The present case was a petition presented under the Settled Estates Act on behalf of the present Marquis Camden, an infant of eleven years of age, the tenant in tail in possession of the family estates, for the confirmation by the Court of the sale of the Wildernesse mansion-house and land adjoining thereto to its present lessee for a sum of 160,000*l.*, the timber (which was estimated to be worth 20,000*l.*) to be taken at a valuation. It appeared that the Camden family property comprised, among other properties, two estates in Kent, some twenty miles apart, namely, Wildernesse estate, Sevenoaks, consisting of some 1,400 acres, producing about 1,500*l.* net annual income, and the Bayham Abbey Estate, Lamberhurst, consisting of a mansion-house and some 10,000 acres, producing about 6,000*l.* or 7,000*l.* net annual income. It was proposed to sell, with the Wildernesse mansion-house, about 1,240 acres, at present producing 1,400*l.* net per annum. The sale was opposed by the infant's paternal uncles, Lord George Pratt and Lord Charles Pratt, who were the tenants for life in remainder under the settlement, and who had on previous occasions successfully opposed proceedings taken in Chancery, having as their object that of the present petition. The trustees of the settlement, which was made by the will of the second marquis, had powers of sale extending over the whole or any part of the devised estates, but one of the two present trustees declined to exercise such power.

Mr. Justice Chitty said that when a similar application was made to the late Vice-Chancellor Malins, the sole question before the Court was whether the Court, supposing it had any jurisdiction, could properly exercise such jurisdiction in controlling the power of sale vested in the trustees, when one of the trustees declined to put such power in force. That learned judge held (*Marquis Camden* v. *Murray*, L. R. 16 Ch. D. 161, at p. 165) that the only state of circumstances which could authorize the interference of the Court, by entertaining applications of the present kind, was one of absolute and overwhelming necessity. He quite agreed with the decision of the Vice-Chancellor, for the Court would not compel the trustees to exercise a power which was not compulsory upon them, and interfere with their

(*c*) See p. 356, *ante*.

discretion in the exercise of what was a mere power and not a trust. The decision, which might almost be treated as a matter of course result of the case as then before the Court, in no way involved the general question of the jurisdiction to sell estates belonging to infants. The present question, in the same form as it was put before the Vice-Chancellor, was afterwards put by the present parties before Lord Justice (then Mr. Justice) Fry, and he had no other course to take but to adopt the decision of the Vice-Chancellor, and refuse the application. The case then found its way to the Court of Appeal, and the decision of Lord Justice Fry was affirmed, but the late Master of the Rolls, while dismissing the appeal, suggested, without passing any judicial opinion, that the case was put before the Court in the wrong form, and that the better course would be to adopt the means of procedure provided by the Settled Estates Act, 1877. He (Mr. Justice Chitty) therefore had to decide the case according to the provisions of that Act. The position of the parties was as follows:—The infant was tenant in tail in possession, and the respondents, the paternal uncles of the infant, were tenants for life in remainder, whose sons, if they had any—and, as a matter of fact, at the present time they had no children now living—would take in succession in the ordinary way as tenants in tail. While the paternal uncles opposed the petition, it was supported by Lord Roden, who had been appointed guardian of the infant for the purposes of the Act, and also by the guardians of the person of the infant—namely, his mother, Lady Camden, Captain Green, and the late Duke of Marlborough. The evidence of the last-mentioned nobleman, whose opinion on such a matter was of weight, as based on knowledge and experience, clearly pointed to the advisability of adopting the proposed sale. He stated in his affidavit that, having regard to the acute depression of agricultural property and the doubt whether landed estate would ever again acquire its former fancy value, the realization of so large a sum as 160,000*l.*, exclusive of timber, would in his judgment, be of great advantage to the plaintiff and all other persons interested in the estate, and he was of opinion that it was for the benefit of all such persons, and, as one of the guardians of the infant, he was desirous that the conditional contract should be confirmed and carried into effect. Mr. P. B. Beresford-Hope, who had been appointed a trustee of the settlement, stated his opinion in the same way, and also supported the sale. The remaindermen had filed affidavits in opposition, pointing to the inadequacy of the price and the undesirability of selling a place to which the family was attached. The evidence on both sides had to be considered, and also the value of the estates subject to the settlement. The whole of the estates in settlement, less deductions and charges, appeared to produce at present some 9,000*l.* per annum. Of this income about 1,400*l.* was produced by the Wildernesse estate and about 6,400*l.* by the Bayham Abbey estate. With reference to the question of family affection, it was certainly more likely that such affection should

attach to the Wildernesse, for it was the older residence of the family. But when this point was advanced by the remaindermen, there was to be considered the circumstance that both of them, together with the third marquis, the father of the infant, were parties to a private Act of 1869, whereby the sum of 50,000*l.* was raised out of the estates for the purpose of building at Bayham Abbey a house "suitable for the residence of the Marquis Camden for the time being," and under which the heirlooms were removed from the Wildernesse to Bayham Abbey. The language of the Act, although in one sense that of the Legislature, was in another that of the persons who promoted the Act, and therefore the preamble of the Act which recited its desirability must be held, to some extent, to express the opinion of the present respondents. Moreover, the Wildernesse estate had been let to its present tenant for some seventeen years, commencing during the lifetime of the second marquis and covering the whole marquisate of the third marquis. It therefore appeared to his lordship that the Wildernesse had been abandoned as the residence of the family, and that Bayham Abbey must be considered to be the family residence. The proposed sale, if carried out, would materially increase the income of the family settlement. Roughly speaking, the sum of 180,000*l.* would, if vested in Consols, produce 5,400*l.* Such a sum, if accumulated during the minority of the present marquis, would, when he became of age, be represented by a sum of some 230,000*l.* This calculation was based on the supposition that the income of the proceeds of sale would follow the trusts of the settlement, and its accumulation form part of the corpus of the trust estate. It was, however, said that the accumulations would never amount to the sum estimated, for if this sale was effected applications for increased maintenance would forthwith be made by the guardians of the infant. Such a consideration, however, could not, in determining the desirability of the sale, be regarded by the Court, for each and every application which might tend to diminish the fund would have to be made to the Court, and be considered on its own merits. The increase to the estate as approximately arrived at must be considered, and also the fact that, were the exceptionally favourable offer by the present lessee of the Wildernesse declined, the house and lands held therewith might be unoccupied for a time, and prove the cause of positive loss to the estate, the present lessee being a tenant from year to year only, and having expressed his intention of securing a permanent residence elsewhere if his offer fell through. It was true that evidence had been advanced by the remaindermen, showing that the estate might be laid out as a building estate, and as such had a rising value, but the material advantage arising from treating the estate in that way, and its preference over the sale now proposed, was not pointed out in the affidavits of the surveyors, whose opinion had been given, and the sum of 180,000*l.* down for the whole estate might clearly be said to more than counterbalance the uncertain and

speculative sale of the estate in portions of building lots for comparatively small sums payable from time to time. It was, in his lordship's opinion, an advantage to all parties to sanction the proposed sale. The Court, however, would be very reluctant to put in force its jurisdiction, derived from the Settled Estates Act, to sell an old family estate. Here, however, there was more than one family estate, and the principal family estate appeared to be, not the estate proposed to be sold, but Bayham Abbey, and he was also satisfied that the income of the settled property, if not increased by some such measure as that now proposed, would be insufficient to keep up a second mansion-house. For these considerations, while not losing sight of the family affection entertained for the Wildernesse by the remaindermen, he felt that it was truly advantageous to the property and parties interested to sanction the sale. By the 16th section of the Settled Estates Act it was provided that it should be lawful for the Court, if it should deem it proper and consistent with a due regard for the interests of all parties entitled, and subject to the restrictions in the Act contained, from time to time to authorize a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates, &c. It was, therefore, clear that the Court, while exercising its power under the Act, must have regard to the interests of the tenant in tail, but also would fail in its duty if it regarded those interests solely to the exclusion of other parties interested. There was, moreover, another and an important provision in the Act, which was an entirely new introduction, and was carefully considered by those who framed the Act. This was the provision of the 25th section, to the effect that where an infant was tenant in tail under the settlement it should be lawful for the Court, if it should think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant. After having fairly considered the case in all its details, he was satisfied that the sale was to the interest of all parties, and the case was one in which, under the jurisdiction conferred by the 25th section, the concurrence of the remaindermen might be properly dispensed with. He should, therefore, make an order confirming the sale, but as the opposition was not of an improper kind, he should direct the costs of all parties to come out of the sale moneys.

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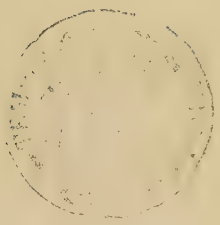

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